Supreme Court, U.S.
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In The
Supreme Court of the United States

CATHY LYNN HENDERSON,

Petitioner,

v.

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE*

QUESTIONS PRESENTED

1. Does *Texas v. Cobb*, 532 U.S. 162 (2001), preclude review of a capital murder conviction based upon evidence obtained when – after petitioner exercised her *Miranda* rights during custodial interrogation and asked for an attorney, to whom she later entrusted confidential, incriminatory information – the State then compelled her attorney to disclose the very information that petitioner lawfully refused to provide to the police?

2. Did the court of appeals err in holding that *Cobb* precludes adjudication of any of the constitutional claims implicated by the State's tactic because, on the day the State court compelled petitioner's attorney to betray her client's confidences, petitioner had been charged only with kidnapping, and that her sixth amendment right to counsel on the murder charge did not attach until the State preferred that charge one day after it wrested the incriminating evidence from petitioner's attorney?

3. Was petitioner denied the effective assistance of counsel on her direct appeal to the Texas Court of Criminal Appeals, when her appellate attorney failed to perfect the record and therefore did not present an argument critical to the Texas court's review of petitioner's claims?

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* We advise the Court that, on November 20, 2006, the state court ordered that petitioner be executed on April 18, 2007.

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The names of all parties appear in the caption.

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The opinion of the court of appeals (*Appendix*, 1a-24a) is reported at 460 F.3d 654 (5th Cir., August 11, 2006). The district court's orders (1) denying the petition for a writ of habeas corpus and granting summary judgment for respondent (*App.* 56a-108a); (2) denying a motion to alter or amend the judgment (*App.* 109a-116a); and (3) granting a certificate of appealability on certain issues (*App.* 117a-124a), are not reported.[1]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The full texts of amendments five and six to the Constitution of the United States of America are printed at *App.* 127a. Although involved only tangentially, the full texts of Sections 19.02 (murder), 19.03 (capital murder) and 20.03 (kidnapping) of the Penal Code of the State of Texas are printed at *App.* 128a-131a.

JURISDICTION

The district court had jurisdiction of the petition for a writ of habeas corpus under 28 U.S.C. § 2254, and denied relief in its order filed March 31, 2004. *App.* 56a. The district court issued a timely certificate of appealability on July 15, 2004 (*App.* 117a), and the court of appeals therefore had jurisdiction under 28 U.S.C. §§ 1291 and 2253(c)(1)(A). Its decision was filed August 11, 2006 (*App.* 1a), and

[1] The Appendix also includes (at 25a-55a) an unreported *per curiam* opinion of the same panel of court of appeals, denying a certificate of appealability on issues that the district court previously declined to certify. We include this opinion in aid of a full understanding of the facts of record below, but petitioner does not seek review of the court of appeals' denial of a certificate of appealability.

a timely petition for rehearing was denied on September 13, 2006. *App.* 125a. Under this Court's Rule 13.3, this petition for a writ of certiorari is therefore due by December 12, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Summary and Fundamentals

In 1995, a Travis County, Texas jury convicted petitioner Cathy Lynn Henderson of murder of an infant, a capital crime under TEXAS PENAL CODE § 19.03(a)(8) (murder of "an individual under six years of age," *App.* 130a). Petitioner was originally arrested on a charge of kidnapping the infant, for whom she was his daily caregiver. During *Mirandized* interrogation,[2] petitioner told the F.B.I. that the baby died accidentally in her home, after which she panicked, buried the body near Waco, Texas, and fled to Missouri. However, petitioner refused to disclose the location of the gravesite, and refused to draw a map depicting that location. She asked instead for an attorney.

Petitioner then met with her *Miranda*-provided attorney, disclosed the location of the gravesite, and drew a map of that location. When the State learned that petitioner had prepared the confidential map to assist her attorneys in providing legal advice, it compelled one of those attorneys to surrender the map, used it to find the infant's body, and charged petitioner with capital murder the next day.

The Texas Court of Criminal Appeals ("TCCA") affirmed the conviction upon a newly minted, *ex post* "exception" to the attorney client privilege, *viz*: the "strong public policy interest of protecting a child from death or serious

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[2] *Miranda v. Arizona*, 384 U.S. 436 (1966), amplified in *Edwards v. Arizona*, 451 U.S. 477 (1981).

bodily injury," *Henderson v. State*, 962 S.W.2d 544, 557 (1997), *cert. denied sub nom., Henderson v. Texas*, 525 U.S. 1978 (1998) ("*Henderson I*").

After denial of state habeas relief, petitioner filed her first federal habeas petition, seeking relief on, *inter alia*, several constitutional questions arising from the State's compelling her attorney to betray petitioner's confidences. The district court, however, declined to adjudicate the merits of any of these questions, holding instead that review was precluded by *Texas v. Cobb*, 532 U.S. 162 (2001) ("*Cobb*"). *App.* 73a-79a. The court of appeals affirmed, adopting the district court's reasoning that, on the day the State seized the confidential map from petitioner's attorney, petitioner was charged only with kidnapping, and that she therefore had no sixth amendment right to counsel on the murder charge, because that charge was not preferred until one day after the State seized the confidential map. *App.* 12a-18a.[3]

The district court also denied relief on the claim that petitioner's appellate counsel provided ineffective assistance when he failed to designate, as part of the record on appeal, a transcript during which the Texas lower court hearing judge said, "I'm convinced that the child is deceased, and since I'm convinced the child is deceased, I really don't see how it can be an ongoing crime." Appellate counsel thus did not argue how the lower court's finding knocked the props from beneath the "exception" created by the TCCA. The district court nevertheless held that this

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[3] As an alternate ground of disposition of *one* of the claims the district court thought implicated by *Cobb*, it also held that this claim had not been exhausted. *App.* 70a-73a. The court of appeals held that review of the exhausted claims was barred by *Cobb*, but did not address whether review of the one unexhausted claim was also barred by *Cobb*. *See App.* 11a. Petitioner does not now seek this Court's review of the "exhaustion" ruling, because if the decision below is reversed, there will be time enough for the district court to reconsider it.

claim did not satisfy the "prejudice" component of *Strickland v. Washington*, 466 U.S. 668 (1984). *App.* 90a-94a, 109a-116a. The court of appeals affirmed on the same ground. *App.* 19a-24a.

B. Petitioner's Arrest and Exercise of Her *Miranda* Rights

On the morning of January 21, 1994, the parents of Brandon Baugh delivered their three-month-old baby to petitioner, the infant's daily caregiver, at petitioner's home near Austin, Texas. Tragically, Brandon died later that day when, according to petitioner, he fell from her arms and struck his head upon the concrete floor of the home. Petitioner had nursing experience, but when her efforts to provide cardiopulmonary resuscitation did not succeed, petitioner panicked, buried the infant's body near Waco, and fled to Missouri.

On February 1, 1994, the Federal Bureau of Investigation arrested petitioner in Kansas City on federal and Texas kidnapping warrants. F.B.I. Special Agent Michael Napier promptly initiated custodial interrogation, beginning with the familiar *Miranda* warning. Petitioner first offered exculpatory reasons for the baby's disappearance, but the Agent persisted and

> Later, through leading questions, Napier elicited from [Henderson] a confession that she killed the baby. He asked [her], "When you say the whole thing, are you talking about that Brandon is dead, that you know where the body's located, that it was an accident, that you're sorry? [She] responded by nodding her head. Later, Napier said, "Brandon's dead. It was an accident." To this statement, [Ms. Henderson] replied, "Yes." Napier asked, "Did you bury him?" [She] responded, "Of course I did. He's just a baby." *Henderson I*, *supra*, 962 S.W.2d at 564.

Agent Napier then asked petitioner to sign a written statement, to tell him the specific location of the infant's

gravesite, and to draw a map depicting that location. The Agent's persistence doubtless brought home to petitioner both the seriousness of her circumstances and the significance of the *Miranda* admonition he had delivered only moments before. Petitioner therefore refused to sign any statement, refused to disclose the location of the gravesite, refused to draw the map requested by Agent Napier, and asked instead for the assistance of an attorney. Napier then terminated his interrogation, precisely as *Miranda* and *Edwards* required of him. *Id.*

Petitioner then met with Assistant Federal Public Defender Ronald Hall, the attorney initially provided in response to her request for the guiding hand of counsel. She spoke with him privately and in confidence, telling Hall where she had buried the body of Brandon Baugh, and drawing for Hall a sketch-map of that location as a means of reducing her words to paper. After petitioner agreed to extradition to Texas, attorney Hall sent the map and other confidential information to a Texas attorney, Nona Byington, who agreed to represent petitioner until the State court appointed a criminal law specialist to assume petitioner's defense. Although there are issues as to Hall's improper disclosure of the *existence* of the confidential map to law enforcement authorities (*see App.* 10a, 118a-119a), he maintained the confidence of his *communications* with his client, and did not succumb to the blandishment of a federal prosecutor who urged Hall to "accidentally leave a copy of the map on the fax machine" when Hall sent it to Ms. Byington. *Henderson I*, *supra*, 962 S.W. 2d at 549.

C. The State Compels Attorney Byington to Surrender Her Client's Map

After State officials learned that petitioner had exercised her *Miranda* rights and refused to draw a map for Agent Napier, but that attorney Byington now had the map drawn for attorney Hall, they turned the heat upon Ms. Byington. A grand jury subpoenaed Byington, and the

local Sheriff demanded that she hand over the map. When Ms. Byington refused, the Sheriff had her arrested on a charge of "tampering with evidence," and his officers searched her office and automobile, albeit to no immediate avail. *Id.* The Sheriff also defamed Ms. Byington to an eager press, labeling her an "accomplice to an ongoing crime" (*App.* 26a). This whipped-up public frenzy well-summarized in THE TEXAS LAWYER'S edition of February 14, 1994 (at 1):

> Anyone listening to the radio call-in shows in Austin recently had no doubt who was the most hated lawyer in central Texas. Austin's Nona Byington, three years out of law school and representing a woman accused of abducting a missing 3-month-old boy, endured five days of vilification for refusing to give authorities the maps her client had drawn showing the location of the infant's body.

On February 7, 1994, the grand jury issued another subpoena demanding that Ms. Byington relinquish her client's map. But the hated and vilified Ms. Byington continued to stand her ground; she refused to comply, asserting the confidentiality of the privileged communications and her client's rights under the fifth, sixth, and fourteenth amendments. The State immediately sought a court order compelling attorney Byington to surrender the map, on pain of jail if she refused.

An evidentiary hearing on the State's motion was held the same day. Consistent with the Sheriff's inflammatory defamations, the State chiefly argued that by withholding the map, attorney Byington was facilitating the "ongoing crime" of kidnapping, and that the crime-fraud exception to the attorney client privilege therefore trumped petitioner's assertion of the privilege. However, after considering all the evidence presented to him at the hearing, the presiding judge rejected the "ongoing kidnapping" argument, saying, "*I'm convinced that the child is*

deceased, and since I'm convinced the child is deceased, I really don't see how it can be an ongoing crime."[4]

The next morning (February 8, 1994), however, the judge nevertheless ordered Ms. Byington to surrender the map, saying that the map was not a confidential communication because, at the time she prepared it for attorney Hall, petitioner harbored the subjective intent of assisting the authorities in locating the infant's body. *See Henderson I, supra*, 962 S.W.2d at 550, and *App.* 5a. Presumably, this "finding" was based upon law enforcement authorities' "subjective belief that any map was made with the [subjective] intent of aiding law enforcement." *App.* 3a, 28a.

Ms. Byington reluctantly capitulated to the court's order and, using the seized map, State authorities located the body of Brandon Baugh on the evening of February 8. On February 9, 1994 the State charged petitioner with the capital murder of Brandon Baugh. *App.* 5a.

Before trial, the same judge revisited his ruling of February 8, this time under a defense motion to suppress the evidence to which the seized map had led the State. The motion was denied on the same ground of non-confidentiality, and also upon the ground that the crime-fraud exception to the attorney client privilege nullified Ms. Byington's refusal to betray her client's confidences. The judge ignored his prior finding that the child was dead, and revived the "ongoing kidnapping" rationale that he refused to invoke at the hearing on February 7-8, 1994. He then added that if the child were dead, the crime-fraud exception for "abuse of corpse" came into play. *Henderson I, supra*, 962 S.W.2d at 550.

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[4] *See Henderson v. State*, 977 S.W.2d 605, 606 (TCCA 1998) ("*Henderson II*") (Overstreet, J., dissenting from denial of petition for rehearing and for leave to withdraw the mandate, quoted *post*, pp. 10-12).

Unless otherwise stated, all emphasis in quoted materials has been supplied.

Trial was held in May 1995, and the jury convicted petitioner on the sole charge of capital murder of an infant, in violation of TEXAS PENAL CODE § 19.03(a)(8).[5] The State's chief evidence was of petitioner's flight to Missouri after the infant died, her burial of the body instead of informing authorities of the death, and the testimony of the County Medical Examiner, who opined that the head trauma sustained by the infant was greater than one might expect had he simply fallen from petitioner's arms to the floor of her home. (Trial Transcript of May 17, 1995, at 1088-1106, and 1133-49 (State's summation of the evidence)).

At the penalty phase, the jury was informed that, if a life sentence were imposed, petitioner would have to spend at least forty years in prison before even being considered (at age 78) for release (Tr. of May 25, 1995, at 862-64). The jury nevertheless answered "Yes" to the question whether "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society" (*id.*, at 869, 923). The jury then answered "No" to the second of the two questions put to it by the court, this one dealing with mitigation. *Id.*, at 869, 923.[6] The trial judge thereupon sentenced petitioner to death. *Id.*, at 924.

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[5] Before trial, the State withdrew the kidnapping charge under TEXAS PENAL CODE § 20.03(a), and the State never charged petitioner with a second count of capital murder "during the course of a kidnapping," *id.*, § 19.03(a)(2). Perhaps these charges were omitted because an element of each is an unlawful "abduction." *See App.* 76a-77a (citing and quoting §§ 19.03(a) and 20.03(a)), and *App.* 16a, parsing the kidnapping statutes as requiring "proof that the child have been taken from his guardians." As the infant died in petitioner's home the same day his parents delivered him there for daycare, the element of a felonious "abduction" or "taking" could not be proved. *See post*, pp. 22-23.

[6] The mitigation question was phrased thus (Tr. of May 25, at 869):

> "Do you find from the evidence, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability

(Continued on following page)

D. Affirmance by the Texas Court of Criminal Appeals

Although Ms. Henderson's federal habeas petition sought relief on a number of grounds, we limit the remainder of this Statement (parts D and E) to the dispositions pertinent to the Questions Presented.

1. The Direct Appeal – *Henderson I*

On direct appeal of the capital conviction, the TCCA affirmed in *Henderson I*, albeit not on the grounds invoked by the lower court. The TCCA began by explaining in some detail why the trial court's reliance upon the crime-fraud exception was flatly wrong "under either the kidnapping or abuse of corpse theory" (962 S.W.2d at 553). The TCCA also declined to endorse the lower court's alternate explanation of non-confidentiality of the map seized from attorney Byington, saying instead that "for purposes of this opinion, we shall assume without deciding, that the maps were intended to be confidential." *Id.*, at 551.

Instead, the Texas high court held that, as a matter of first impression, the confidentiality heretofore vouchsafed by the attorney client privilege must "yield to the strong public policy interest of protecting a child from death or serious bodily injury." *Id.* at 557. A few pages later, the TCCA recognized the constitutional implications of its "exception," but brushed them aside, saying:

> The Supreme Court has held that compelled disclosure of information from a defendant's attorney does not implicate the defendant's Fifth Amendment right against self-incrimination, even if government compulsion of the same information from the defendant personally would

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of the defendant, that there is a sufficient mitigating circumstance or circumstances that a sentence of life imprisonment rather than a death sentence be imposed?"

> have violated that right. *Fisher v. United States*, 425 U.S. 391, 397-400, (1976). (*Id.*, 962 S.W.2d at 559).[7]

Accordingly, the TCCA held that the only factual predicate to the application of its new "exception" to the privilege was the "sincerity" of police belief that the infant might still have been alive at the time the map was seized, and that this determination lay within "the exclusive province of the trial court." *Id.*, 962 S.W.2d at 557, n. 12.

2. Denial of Rehearing – *Henderson II*

In reaching its conclusion that the issue was one of "sincerity" of police belief, the TCCA was unaware that the lower court had made no such finding, and instead had found that "the child is deceased," and that the State's theory of an "ongoing crime" was without foundation in the record. The TCCA's unawareness resulted because petitioner's appellate counsel failed to include in the record the critical hearing transcript of February 7, 1994. Appellate counsel therefore had no basis in the record to argue that the State had not proved the factual predicate to the new "exception" created by the TCCA. *App.* 22a-23a.

Some while after the TCCA affirmed the conviction, petitioner's state habeas counsel located the February 7 hearing transcript. Petitioner then moved the TCCA for rehearing and for leave to withdraw the mandate. The motion was summarily denied in *Henderson II, supra*, 977 S.W.2d at 605, but Judge Overstreet dissented, saying (*id.*, at 606):

> [A]ppellant's motion suggesting that we grant such rehearing informs us that a transcription of a newly discovered *in camera* hearing, which contains information relevant to the disposition of points of error one and two, has recently been

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[7] This view of *Fisher*'s holding is not accurate. *See post*, pp. 25-26.

recovered. This transcription shows that the trial judge, in determining whether to order production of the maps in question, believed that the decedent in this case was already dead and thus there was no continuing kidnapping. Specifically, *in camera*, the trial judge said,

> "I'm convinced that the child is deceased. And since I'm convinced the child is deceased, I don't really see how it can be an ongoing crime."

The trial judge added that he didn't see how he was going to order appellant's attorney to reveal the maps. He even commented that appellant's attorney was "doing the right thing" and that "the rest of us must do the right thing. You've shamed us into it." Nevertheless, when the trial judge reappeared in open court with the world watching and all shame was apparently brushed aside, the trial judge ordered appellant's attorney to produce the maps, which aided law enforcement officials in locating the decedent.

This newly discovered transcription of the *in camera* proceeding certainly contains evidence that could impact this Court's analysis, since this Court initially concluded that "at the time the trial court compelled production of the maps, authorities had reason to believe that the baby might still be alive." *Henderson v. State*, 962 S.W.2d 544, 557 (Tex. Crim. App. 1997). However, as quoted above, the trial judge, who was the fact finder on the map production/suppression claims, point blankly did not believe the decedent was still alive. And such a conclusion simply makes sense – how can a three-and-a-half-month-old infant who has been abandoned and left alone outside for several days still be alive?

Of course this evidence of the *in camera* hearing may not alter the conclusion of this Court, i.e. even after considering it this Court may very

> well still conclude that points one and two must be overruled. However, we should withdraw the mandate and grant rehearing to at least address this new evidence and dispose of the points based upon a complete record. Because this Court refuses to do so, I dissent.

E. Proceedings Below

After petitioner's state habeas efforts were unsuccessful, she filed a timely petition for a writ of habeas corpus in the district court below. It denied all relief, and granted summary judgment for respondent, in its order of March 31, 2004. *App.* 56a-108a. The district then issued a certificate of appealability on certain of the issues (*App.* 117a-124a), and the court of appeals denied a COA on the issues not so certified. *App.* 25a-55a. After oral argument, the court of appeals then affirmed on the certified issues in its decision of August 11, 2006 (*App.* 1a-24a), and denied a timely petition for rehearing on September 13, 2006. *App.* 125a-126a.

1. On the Issues Said to Implicate *Texas v. Cobb*

The district court did not reach the merits of petitioner's claims of constitutional violations in the seizure of the map from her attorney, or her claims of ineffective assistance of the attorneys who acted for her in regard to the map. Instead, it held that *Cobb* precluded relief on each of those claims, reasoning that on February 8, 1994 – the day on which the map was seized and the infant's body found – petitioner had only been charged with kidnapping, and that any sixth amendment right to counsel on the murder charge did not arise until the following day, when the State charged petitioner with capital murder of Brandon Baugh. *App.* 73a-79a.

On one (but only one) of these *Cobb*-implicated claims, the district court also denied relief on the alternate ground

that petitioner had not exhausted that claim in her state habeas petition (*App.* 71a-73a), but in its order of July 15, 2004, the district court nevertheless granted a certificate of appealability under 28 U.S.C. § 2253(c)(1)(A), on *all* the *Cobb*-implicated issues, saying:

> The *Texas v. Cobb* rule, addressed at length in the Court's March 31, 2004 opinion, has always struck this Court as harsh and in this situation, where Henderson was at the time of the allegedly problematic conduct charged with kidnapping the same child she was eventually charged with murdering, there seems significant danger of gamesmanship by authorities. * * * [I]n this case, with its extreme factual scenario, the petitioner should at least be able to argue that the existing precedent is distinguishable and a different conclusion than the one reached by the Court in this case is warranted. *App.* 122a.

On the *Cobb*-implicated claims that had been exhausted, the court of appeals affirmed on the same rationale as that of the district court. *App.* 12a-18a. On the single *Cobb*-implicated claim that the district court held, alternatively, had not been exhausted, the court of appeals simply affirmed on the ground of failure to exhaust. *App.* 11a.

2. On the Claim of Ineffective Assistance of Appellate Counsel

The district court also held that petitioner's claim of ineffective assistance of her appellate counsel did not satisfy *Strickland*'s prejudice component. *See App.* 91a-92a (initial order of the district court); reiterated at *App.* 109a-116a (order denying motion to alter or amend the judgment). The district court reasoned that the "focus" of the exception to the privilege created by the Texas high court was upon "the mind-set of the authorities, as opposed to the belief of the [trial] judge" (*App.* 92a), and that the judge "could have believed, simultaneously: (1) that

Brandon was dead, and (2) there was a remote possibility that he was alive, and the law enforcement officials had some basis for believing Brandon was still alive." *App.* 115a. The court of appeals affirmed upon the same essential rationale. *App.* 19a-24a.

REASONS FOR GRANTING THE WRIT

1. *Texas v. Cobb* Does Not Support the Decision Below, and this Court Should Reject the Effort to Extend *Cobb* to Situations that Do Not Implicate Any of *Cobb*'s Concerns

Just three terms ago, in *Missouri v. Seibert*, 542 U.S. 600 (2004), this Court strongly disapproved State efforts to end-run the protections secured by *Miranda*. Here, the State employed a different tactic, but one to the same end of compelling petitioner to incriminate herself notwithstanding her plain and unambiguous assertion of her right not to do so. Indeed, the State's tactic here is even more troublesome than that of the double-questioning method of *Seibert*, for it would be difficult to imagine a maneuver more at odds with *Miranda* – and with this Court's jurisprudence[8] – than invasion of the confidentiality of a *Miranda*-provided attorney's communications with her client in order to secure the very information that the police could not and did not wrest from petitioner herself.

The court of appeals' use of *Cobb* to fence-off merits review of these important questions deserves review by this Court. The decision below is not adumbrated by *Cobb*, does not arise in a setting that implicates *any* of the jurisprudential considerations that animated *Cobb*, and is not faithful to *Cobb*'s careful explanation that *Miranda* provides the bulwark protection of the right to counsel

[8] *See Fisher v. United States*, 435 U.S. 391 (1976), and other decisions discussed *post*, pp. 23-28.

before a suspect has been indicted on the offense to which the interrogation pertains.

Quite unlike the respondent in *Cobb*, petitioner is not asking the courts to annul her *Mirandized* statements to F.B.I. Agent Napier, much less to do so under the guise of "time shifting" the postindictment waiver standards of *Michigan v. Jackson*, 475 U.S. 625 (1986), to preindictment interrogations governed by *Miranda*. Petitioner simply seeks merits review of her underlying constitutional claims that the State violated her right to remain silent and her right to counsel by forcing her attorney to betray her confidences, and that the assistance of her trial court attorneys in attempting to prevent the State from doing so was constitutionally ineffective. Merits review will not implicate either *Jackson* or the concern about police confusion in a setting governed by *Miranda* and not by *Jackson*.

The court below accused petitioner of seeking an "exception" to *Cobb* (*App.* 17a), but the shoe really is on the other foot: It is respondent who seeks a sharp and unprincipled departure from the jurisprudential considerations that informed *Cobb*. No other court of appeals has pushed *Cobb* in the direction of the court below, and in a capital case, time and circumstance do not justify postponing resolution to another day. As well, review and reversal will open the gateway to the district court's adjudication of the troublesome and important questions implicated in the TCCA's new "exception" to the confidential relationship between defense attorneys and their clients.

(a) This Case Does Not Implicate *Cobb*'s Concerns About the Difference in the Waiver Standards of *Miranda* and *Jackson*

At bottom, *Cobb* resolved a conflict between *Miranda*'s standard of waiver of the right to counsel during the interrogation of uncharged crimes, and the greater hurdle imposed by *Jackson*, when and if police wish to interrogate

a defendant about a crime on which he has already been charged. From a law enforcement and societal perspective, the *Miranda* standard is a good deal more forgiving than is that of *Jackson*, for *Miranda* is an appropriately tailored accommodation of the need for elbow-room during ongoing police investigation of suspected but yet-unverified criminal activity. *See Moran v. Burbine*, 475 U.S. 412, 426 (1986).

In *Cobb*, the respondent confessed to robbery, and was indicted on that charge. Some months later, he confessed to the then-unindicted crime of murder. This Court stressed that on each occasion, "police scrupulously followed *Miranda*'s dictates when questioning respondent." *Cobb*, 532 U.S. at 171. Respondent Cobb was therefore in a pickle of his own making, for "giving the warnings and getting a waiver has generally produced a virtual ticket of admissibility" of the suspect's confession. *Missouri v. Seibert*, *supra*, 542 U.S. at 608-09 (plurality opinion of Souter, J.).

With nowhere to go under *Miranda*, Cobb asked the TCCA to annul the State's "ticket of admissibility" by shifting *Jackson*'s postindictment waiver standard backward in time to preindictment interrogation of *any* uncharged crime that was "factually related" to the already-charged crime of robbery. The TCCA agreed, and held that Cobb's fully-*Mirandized* second confession to murder was nevertheless inadmissible under *Jackson*. Thus, *Cobb v. State*, 93 S.W.3d 1, 6 (TCCA 2000):

> [O]nce the right to counsel has attached and has been invoked, *any* subsequent waiver during police-initiated interrogation is *ineffective* unless counsel has first given *permission* for the interrogation. *Michigan v. Jackson*, 106 S. Ct. at 1411.

But counsel's "permission" is no part of the *Miranda* regime; it is quite enough that police advise the suspect that he may speak with an attorney if he wishes, but that if he waives that right, anything he says can and will be used against him in a court of law. The advise-waive

regime of *Miranda* therefore represents a carefully balanced compromise between the polar extremes of prohibiting custodial interrogation altogether, or retaining the unsatisfactory practice of considering "the totality of all the surrounding circumstances" case-by-case. *Dickerson v. United States*, 530 U.S. 428-434 (2000). *Miranda*'s compromise also accommodates the continuing "need for police questioning as a tool for effective law enforcement" and society's "compelling interest in finding, convicting and punishing those who violate the law." *Moran v. Burbine, supra*, 475 U.S. at 426.

As a practical matter, the Texas high court's use of *Jackson* to nullify a *Mirandized* confession to murder upset *Miranda*'s longstanding compromise, rendering *Miranda* a dead letter in the many settings in which police are investigating other crimes of which the defendant remains a yet-uncharged suspect. *See Cobb*, 532 U.S. at 169-72. As Justice Kennedy expatiated in his concurring opinion in *Cobb* (*id.*, at 174-75):

> As the facts of the instant case well illustrate, it is difficult to understand the utility of a Sixth Amendment rule that operates to invalidate a confession given by the free choice of suspects who have received proper advice of their *Miranda* rights but waived them nonetheless. The *Miranda* rule, and the related preventative rule of *Edwards v. Arizona*, 451 U.S. 477 (1981), serve to protect a suspect's voluntary choice not to speak outside his lawyer's presence. The parallel rule announced in *Jackson*, however, *supersedes* the suspect's voluntary choice to speak with investigators.

"*Supersedes*" is precisely the right word for the reason explained by Justice Scalia, dissenting in *Dickerson v. United States*, *supra*, 530 U.S. at 449:

> Counsel's presence is not required to tell the suspect that he *need* not speak; the interrogators can do that. The only good reason for having

> counsel there is that he can be counted on to advise the suspect that he *should not* speak. See *Watts v. Indiana*, 338 U.S. 49, 59 (1949) (Jackson, J., concurring in result in part and dissenting in part) ("Any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances") (emphasis in original).

This Court therefore reversed the TCCA's decision in *Cobb*. It was as at pains to stress not only police "scrupulous" adherence to *Miranda* before interrogating Mr. Cobb, but also *Miranda*'s role in the provision of a right to counsel on uncharged crimes. The Court's majority therefore assured the dissenting Justices that fealty to *Miranda* remains an entirely satisfactory means of assuring the right to counsel before formal charges have been preferred. Thus (532 U.S. at 171-72, n. 2):

> [T]he dissenters give short shrift to the Fifth Amendment's role (as expressed in *Miranda* and *Dickerson*) in protecting a defendant's right to consult with counsel before talking to police. Even though the Sixth Amendment right to counsel has not attached to uncharged offenses, defendants retain the ability under *Miranda* to refuse any police questioning, and, indeed, charged defendants presumably have met with counsel and have had the opportunity to discuss whether it is advisable to invoke those Fifth Amendment rights. Thus, in all but the rarest of cases, the Court's decision today will have no impact whatsoever upon a defendant's ability to protect his Sixth Amendment right.

In the present case, the decision of the court of appeals flouts the very *Miranda* analysis that is the critical underpinning of *Cobb*. Petitioner chose not to continue speaking with F.B.I. Agent Napier, and broke off his interrogation by requesting an attorney. Mr. Cobb did neither, and the conflict between *Miranda* and *Jackson* simply is not present here at all. The court of appeals did

not merely give "short shrift" to *Miranda*, it ignored it altogether in the teeth of *Cobb*'s *ratio decidendi*.

The only thing that perhaps need be added is that, although the preindictment right to counsel under *Miranda* is sometimes said to flow more from the fifth amendment than directly from the sixth, this is a distinction without any meaningful difference on the facts of this case. Counsel's office under *Miranda* is to protect the suspect's right not to incriminate herself during interrogation, and that is the same office of sixth amendment counsel during any postindictment interrogation as well. *See Patterson v. Illinois*, 487 U.S. 285, 294, n. 6, and 299, n. 12 (1988):

> An important basis for our analysis is our understanding that an attorney's role at postindictment questioning is rather limited, and substantially different from the attorney's role in later phases of criminal proceedings. At trial, an accused needs an attorney to perform several varied functions – some of which are entirely beyond even the most intelligent layman. Yet during postindictment questioning, a lawyer's role is rather unidimensional: largely limited to advising his client as to what questions to answer and which ones to decline to answer. * * * *
>
> We note, incidentally, that in the *Miranda* decision itself, the analysis and disposition of the waiver question relied on this Court's decision in *Johnson v. Zerbst*, 304 U.S. 458 (1938) – a *Sixth Amendment* waiver case. See *Miranda*, 384 U.S., at 475. From the outset, then, this Court has recognized that the waiver inquiry focuses more on the lawyer's role during such questioning, rather than the particular constitutional guarantee that gives rise to the right to counsel at that proceeding. See *ibid.*; see also *Moran v. Burbine*, 475 U.S., at 421. Thus, it should be no surprise that we now find a strong similarity between the level of knowledge a defendant must have to waive his

> Fifth Amendment right to counsel, and the protection accorded to Sixth Amendment rights. (emphasis in original).

Accordingly, the scope of the right to counsel under the two Amendments differs only in a respect not present here – the standard of waiver under *Miranda* and that under *Jackson*. In this context, the statement that the sixth amendment is "offense specific" is simply a convenient shorthand means of explaining why the *Jackson* standard is inapplicable during preindictment interrogation. This case implicates neither standard, because there was no waiver at all on the critical question of the location of the gravesite of the deceased infant. *Patterson* therefore scotches the court of appeals' effort to portray petitioner's right to counsel as one arising *only* under the sixth amendment, and not equally under the fifth, per *Miranda*.

(b) This Case Does Not Implicate *Cobb*'s Concern About "Police Confusion"

As well, this case does not implicate *Cobb*'s additional concern that time-shifting the *Jackson* standard would require police to wrestle with "the dissent's vague iterations of the 'closely related to' or 'inextricably intertwined with' test that would defy simple application," leading to the unacceptable consequence that "police likely would refrain from questioning certain defendants altogether." (*Cobb*, 532 U.S. at 174).

Petitioner seeks no relief based upon the timing or content of the *Miranda* admonition that F.B.I. Agent Napier delivered to her, and she seeks no relief based on what she admitted to the Agent before invoking her *Miranda* rights. Napier correctly advised petitioner that she had a right to counsel, and that if she voluntarily chose to speak without first seeking counsel's advice, *anything* she said could be used against her. Words of broader dimension would be difficult to imagine, and they capture for a lay person the point that *Miranda* is not

"offense specific." Petitioner therefore *knew* that if she answered any questions about the infant's death, she did so at her peril. *Miranda* also did not obligate Agent Napier to advise petitioner that "any lawyer worth his salt will tell [you] in no uncertain terms to make no statement [to me] under any circumstances." *Watts v. Indiana, supra*, 338 U.S. at 59, because the Constitution

> does not require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights.

Moran v. Burbine, supra, 475 U.S. at 422.

Accordingly, the State's problem here has nothing whatsoever to do with the timing or content of Agent Napier's admonition or any "confusion" on his part. The State's only "problem" was that petitioner heeded Napier's warning, stopped talking, and asked for an attorney. *Cobb* has nothing whatsoever to do with that "problem," precisely because respondent Cobb either paid no attention to the *Miranda* admonition, or voluntarily chose to speak anyway. Again, therefore, no principled application of *Cobb* can be used to erect a barrier to review of the merits of the State's attempt to solve its "problem" by converting attorney Byington into a witness against her client.

(c) *Cobb* Does Not Sanction State Invasion of Petitioner's Right to Counsel Simply Because the Ultimate Fruit Differed from that Asserted to Justify the Invasion

The district court was also correct in expressing its concern for the harshness of applying *Cobb* "in this situation, where Henderson was at the time of the allegedly problematic conduct charged with kidnapping the same child she was eventually charged with murdering, there seems danger of significant gamesmanship by authorities." *App.* 122a. On February 8, 1994, the State wrested the map from attorney Byington and found the body of Brandon

Baugh. It charged petitioner with capital murder the next day. All agree that, on February 8, (i) petitioner had a right to counsel, under *Miranda*, on the yet-uncharged crime of murder, (ii) petitioner had a sixth amendment right to counsel on the kidnapping charge; (iii) the kidnapping charge was the basis of the lower court's order compelling attorney Byington to surrender the map; and (iv) the TCCA's affirmance rested upon a "public policy" of permitting police to search for the person of Brandon Baugh, in dire jeopardy were he still alive.

Even if one ignores petitioner's ongoing right to counsel under *Miranda*, taking the State and its high Court at their respective words about the "kidnapping" basis for invading petitioner's confidences with her attorney, does not lead to the conclusion that a sixth amendment violation is somehow erased by the happenstance that the State turned out to be wrong in seeking the map on the basis of a kidnapping charge, because young Baugh died in petitioners' home two weeks before the order requiring seizure was obtained. This result cannot be squared with *Cobb*, least of all in the light of petitioner's invocation of her *Miranda* rights, which in *Cobb* this Court stressed as the bulwark protection of a suspect's rights in a preindictment setting. Any effort to draw a distinction between the right of counsel under *Miranda*, and the right of counsel under the sixth amendment, makes no sense at all, for the very reasons explained in *Patterson v. Illinois*, quoted *ante*, pp. 19-20.

The court of appeals did not respond at all to the district court's expression of concern about the "harshness" of a mechanical application of *Cobb* in this setting. Instead, it brushed the point aside simply by saying that under *Blockburger v. United States*, 284 U.S. 299, 304 (1932), kidnapping and murder are separate offenses, because kidnapping requires proof of felonious abduction, i.e., "that the child [had] been taken from his guardians." *App.* 16a. But this misses the central point of another difference between this case and *Cobb*. In that case, the

State obtained Mr. Cobb's confessions to two crimes, and it was at liberty to, and did, convict him on both. Here in contrast, the State seized the map in order to determine, ultimately, *which* of two separate charges would support a conviction – kidnapping *or* murder, but not both for want of any "abduction" in the death of the infant in petitioner's home on the day his parents brought him there for care-giving. *See ante*, p. 8 & n. 5.

Nothing in *Cobb* supports any principled reason for the implicit holding below, which was that *if* the police found Brandon alive, petitioner would have a full opportunity to litigate the merits of fifth and sixth amendment violations attending seizure of the map, but that these claims simply evaporated *because* Brandon died in petitioner's home, and the map was seized the day before the State preferred the capital murder charge. Perversely, it could be said that petitioner would have been better off without a *Miranda*-provided attorney, because then there would have been no surrogate from whom the State could extract the incriminating evidence that petitioner refused to disclose to Agent Napier during custodial interrogation. That would stand *Miranda* on its head. The decision below is more than just "harsh"; it is also a perfect example of what this Court, speaking through Justice Frankfurter, once called "mechanical jurisprudence in its most glittering form," *Bindczyck v. Finucane*, 342 U.S. 76, 85 (1951).

2. Review Should Be Granted as a Gateway to Consideration of the Important Questions Arising in the *Henderson I* Decision of the Texas Court of Criminal Appeals

The constitutional questions implicit in *Henderson I* are themselves important and troublesome, for never before has this Court suggested or approved invasion of the attorney privilege to secure evidence that the client is lawfully entitled to withhold from the police. The writ should therefore be granted as a gateway to the full

consideration of these important questions by the district court in the first instance.

At bottom, the right to counsel would be hollow indeed were counsel subject to even the risk, much less the reality, of being conscripted to reveal that which the client may not be compelled to disclose. The right to remain silent "contains an implicit assurance that silence will carry no penalty," *Doyle v. Ohio*, 426 U.S. 610, 618 (1976), and a penalty more severe than compelled disclosure of confidential information imparted only to counsel would be difficult to imagine. It is of course no answer to say that in such circumstances, the penalty may be "avoided" by refusing to confide in one's attorney, for as Justice White observed for the Court in *Fisher v. United States*, *supra*, 425 U.S. at 403:

> The purpose of the privilege is to encourage clients to make full disclosure to their attorneys. As a practical matter, if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer, and it would be difficult to obtain fully informed legal advice.

This is hardly a novel proposition, *see*, *e.g.*, *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888) ("assistance [of counsel] can only be safely and readily availed of when free from the consequences or the apprehension of disclosure").

The TCCA itself seemed to recognize some of this, but ended up getting things backwards. It said that in *Fisher*, this Court authorized law enforcement to seize client documents from an attorney, *even when* those materials would be privileged and *not* obtainable if sought from the client herself. *Henderson I*, *supra*, 962 S.W.2d at 558-59. But *Fisher* holds just the reverse, as a side-by-side comparison discloses:

***Henderson I*, at 558-59:**	***Fisher*, 425 U.S. at 404:**
The Supreme Court has held that compelled disclosure of information from a defendant's attorney does not implicate the defendant's Fifth Amendment right against self-incrimination, *even if* government compulsion of the same information from the defendant personally would have violated that right. *Fisher v. United States*, 425 U.S. 391-397-400	Where the transfer is made for the purpose of obtaining legal advice, the attorney-client privilege would be defeated unless the privilege is applicable. "It follows, then, that when the client himself would be privileged from production of the document, either as a party at common law or as exempt from self-incrimination, the attorney having possession of them is *not bound to produce*." [quoting WIGMORE].

Fisher's holding is thus that "attorneys, while barred from directly asserting their clients' fifth amendment privilege, could resist the summonses on the ground of attorney-client privilege if the fifth amendment would have prevented compelled disclosure of the documents while in the [client's] possession." S. Alito, *Documents and the Privilege Against Self-Incrimination*, 48 U. PITT. L. REV. 27, 43 (1986). This is why *Fisher* necessitated resolution of whether preexisting business records of the taxpayers' accountants would have been unavailable to the Government had they been sought from the taxpayers themselves, rather than from the taxpayers' attorneys. This Court's holding that the taxpayers themselves could not object to disclosure of the documents in their own hands was therefore quite unremarkable. *See Fisher*, 425 U.S. at 409 ("The accountant's workpapers are not the taxpayer's. They were not prepared by the taxpayer and they contain no testimonial declarations by him."). Here in contrast, petitioner prepared the incriminating maps, and provided them to her attorneys in order to obtain the very legal advice that *Fisher* protects.

Fisher also informs this Court's decisions disapproving exceptions to attorney client and other privileges based upon "policy considerations" in which a court *ex post* determines that the privilege must, in the words of the Texas high court, "yield" to the importance of the information demanded of the confidant. *See Upjohn Corp. v. United States*, 449 U.S. 383, 392-93 (1981) (quoting *Fisher* and *Blackburn*, and explaining that exceptions "frustrate[] the privilege," and "an uncertain privilege . . . is little better than no privilege at all").

In *Jaffe v. Redmond*, 518 U.S. 1 (1996), the Court approved the Seventh Circuit's endorsement of a psychotherapist-patient privilege that, like the attorney client privilege, "is rooted in the imperative need for confidence and trust," *id.*, at 10, but it then added (*id.*, at 17-18):

> We part company with the Court of Appeals on a separate point. We reject the balancing component of the privilege implemented by that court and a small number of States. Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege. As we explained in *Upjohn*, if the purpose of the privilege is to be served, the participants in the confidential conversation "must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." 449 U.S. at 393.

And most recently in *Swidler & Berlin v. United States*, 524 U.S. 399, 409 (1998), the Court again returned to these basic themes:

> Balancing *ex post* the importance of the information against client interests, even limited to criminal cases, introduces substantial uncertainty into the privilege's application. For just

> that reason, we have rejected use of a balancing test in defying the contours of the privilege. *See Upjohn*, 449 U.S. at 393; *Jaffee*, 518 U.S. at 17-18.

The Texas high court's decision in *Henderson I* introduces the same uncertainties to which these decisions speak, and leads to the same confusion (albeit among criminal defense attorneys, rather than the police), that *Cobb* identified. *Ante*, pp. 20-21. Indeed, the State does not come with very good grace defending a rule of law laced with the same uncertainties that it vigorously cited in urging reversal of its own high Court in *Cobb*.[9]

As well, a rule of law that, as a practical matter, either imperils or impedes counsel's full and frank communications with her client is much like the "no communications" order disapproved in *Geders v. United States*, 425 U.S. 80 (1976). *See Strickland v. Washington*, *supra*, 466 U.S. at 686 (the "Government violates the right to effective assistance of counsel when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense," citing *Geders*).

Still further, when attorney Byington was put to the choice of going to jail or sacrificing her client's interests, there was an immediate and irreconcilable conflict between her interests and those of her client. *See Cuyler v. Sullivan*, 446 U.S. 335 (1980). This shows another vice of efforts to force attorneys to betray their clients' confidences. The "public policy" rationale of *Henderson I* would

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[9] *See* Pet. Br. in *Cobb*, No. 99-1702, 1999 U.S. Briefs (Lexis) 1702 at *23 ("when faced with an ongoing investigation into a prospectively indefinable 'factual scenario,' the police will not be able to foresee what distinct crimes may come to light"), and Brief for the United States as Amicus Curiae in *Cobb*, *id.* at *26 (the decision below "would have the adverse practical effect of discouraging law enforcement officers from approaching a suspect about [uncharged] criminal activity" and would "unnecessarily frustrate the public's interest in the investigation of criminal activities").

apply equally to State efforts to wrest information from the suspect herself, but that would be unavailing. Threatening jail to an already-incarcerated defendant is a labor to no purpose, but it is quite another thing to threaten her attorney with incarceration, particularly in the highly volatile atmosphere that the State itself orchestrated when the Sheriff "publicly accused Byington of being an accomplice in an ongoing crime." *App.* 28a.

This Court should not preclude district court consideration of these important questions, least of all by fencing them off by an unprincipled extension of its decision in *Cobb*.

3. Petitioner's Ineffective Assistance of Counsel Claim Also Implicates the Important Question of Circumvention of *Miranda*

If Henderson I's "public policy" exception to the attorney-client privilege can ever be justified, and *if* the decision in *Cobb* places that issue beyond the reach of federal habeas (or any other) review, then the exception should be narrowly tailored, and it is critical that the judge who pierces the veil does so only on the most defensible ground supported by the record. Here, that did not happen.

The court below mistakenly viewed the issue as nothing more than a disagreement between what the authorities "believed" and what the judge who issued the map seizure order "believed" after considering all the evidence presented at the February 7, 1994 hearing on the State's motion to compel attorney Byington to disclose her client's confidential communications, reduced to writing in the form of the map. *App.* 23a. But this approach impoverishes the critical role of judicial oversight of State efforts to go where the Constitution may otherwise forbid. As dissenting Judge Overstreet correctly observed in *Henderson II*, *supra*, 977 S.W.2d at 606:

> However, as quoted above, the trial judge, who was the *fact finder* on the map production/suppression claims, point blankly *did not believe* the decedent was still alive. And such a conclusion simply makes sense – how can a three-and-a-half-month-old infant who has been abandoned and left alone outside for several days still be alive?

"Sincerity" of police belief is not the appropriate touchstone because there never has been, and never will be, any application for search or seizure unaccompanied by police "sincerity." The office of a judicial hearing is therefore to test such claims on the basis of credible, objective facts, and when appellate counsel failed to perfect the record, petitioner was deprived of the opportunity to show the TCCA why its newly minted "exception" had no support in the record.

Strickland's touchstone is *not* that the TCCA "*would have* reached the same conclusion had it possessed the missing transcript" (*App.* 25a), for that invokes the obverse of *Strickland*'s statement that

> [W]e believe that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case. * * * The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome. (466 U.S. at 693-94).

Accordingly, the correct standard is that the

> defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* at 694.

Respectfully, no confidence at all can be reposed in a death sentence imposed under the circumstances of this case, and counsel's inexplicable failure to perfect the

record on the critical issue of what the trial court found and did not find reinforces that conclusion. Indeed, the district court ultimately had to speculate about what the state judge "could have believed" (*App.* 115a), but what the judge said he believed from the evidence was clear and unambiguous. "I'm *convinced* that the child is dead."

CONCLUSION

The petition should be granted.

Dated: December 12, 2006.

Respectfully submitted,

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APPENDIX A

460 F.3d 654

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 04-70032

CATHY HENDERSON,

Petitioner-Appellant,

versus

NATHANIEL QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee.

Appeal from the United States District Court
for the Western District of Texas
(A-02-CA-758-SS)

(Filed Aug. 11, 2006)

Before JONES, Chief Judge, and BARKSDALE and PRADO, Circuit Judges.

RHESA HAWKINS BARKSDALE, Circuit Judge:

Cathy Henderson, convicted in 1995 of capital murder of a child under age six (capital child murder), in violation of TEX. PENAL CODE ANN. § 19.03(a)(8), and sentenced to death, seeks habeas relief from our court pursuant to issues for which the district court granted her a certificate

of appealability (COA). (Recently, our court denied her COA request on additional issues. ***Henderson v. Dretke,*** 164 F. App'x 506 (5th Cir. 2006).)

Henderson was not charged with capital child murder for more than two weeks after being charged with kidnapping the child. Primarily at issue is whether, for events that occurred between the two charges, she can assert Sixth Amendment claims regarding the murder charge. The district court certified for appeal the claims related to this issue because of the possible unfairness of those claims being precluded by ***Texas v. Cobb,*** 532 U.S. 162, 167-68, (2001) (holding an accused's Sixth Amendment right to counsel does not attach to uncharged crimes "factually related" to the crime for which the defendant has been charged). **AFFIRMED.**

I.

On the morning of 21 January 1994, parents left their three-and-one-half month old son (the child) with Henderson. Later that day, the child sustained massive head trauma, causing his death.

Soon thereafter, on 23 and 25 January, respectively, state and federal warrants were issued against Henderson for the felony offense of kidnapping. Approximately one week later, on 1 February, the FBI arrested Henderson in Kansas City, Missouri.

During her interrogation by an FBI Agent, Henderson initially denied knowledge of the child's whereabouts and stated she had left him with his grandmother; she soon confessed, however, to killing the child (but claimed it was an accident) and to burying him in a wooded area near

Waco, Texas. Nevertheless, when the FBI Agent asked Henderson to draw a map to the burial site, she refused; and, after the Agent reduced Henderson's comments to writing, she refused to sign the statement and requested a lawyer.

Later that day, Henderson met with an assistant federal public defender (the AFPD) in Kansas City and that office's chief investigator (FPD investigator). Concluding that he needed a Texas map to facilitate Henderson's cooperation with authorities' efforts to locate the child, the AFPD requested one from a second FBI Agent. This second FBI Agent had observed, through a one-way mirror, Henderson's interrogation by the other FBI Agent. Unsure of the reason for that request, the second FBI Agent did not assist the AFPD. Accordingly, the AFPD obtained a map from the FPD investigator's office in another building and asked Henderson to draw a map to the burial site. Henderson did so no later than the next day, 2 February.

After his interview with Henderson, the AFPD met with several persons in law enforcement, including an Assistant United States Attorney (AUSA) and the second FBI Agent. The AFPD opined that the child was dead. In addition, state and federal law-enforcement personnel testified at trial that: the AFPD told them Henderson had drawn a detailed map to the burial site (the map or maps); and the AFPD could find that site using the map. The AFPD denies making those statements or ever giving the agents any indication of any map's existence. In any event, the second FBI Agent and the AUSA formed the subjective belief that any map was made with the intent of aiding law enforcement.

On 2 February, the AFPD faxed maps prepared by Henderson to Nona Byington, Henderson's counsel in Texas, where the case was being investigated by Travis County Sheriff Keel. State law-enforcement officers, who had learned from the AFPD that he intended to send materials to Byington, contacted her and requested the maps. After Byington attempted unsuccessfully to negotiate a plea agreement in exchange for the maps, she refused to provide any in her possession.

On 3 February, Texas lawyer Linda Icenhauer-Ramirez was appointed to represent Henderson on the 23 January state kidnapping charges. That same day, a Travis County grand jury issued a subpoena *duces tecum* for Byington to appear with any maps in her possession. She refused, claiming attorney-client privilege. A warrant was issued for her arrest, as well as a search warrant for her automobile and house. The arrest warrant was soon withdrawn. Authorities executed the search warrant but did not find any maps.

Earlier, on 2 February, Henderson (who had waived extradition) had been returned to Texas, where she was placed in solitary confinement under a "firewatch" – a procedure whereby inmates monitor another inmate for safety reasons. During that firewatch, between 5 and 8 February, Henderson befriended inmate Bolivia Jackson and they communicated on numerous occasions (correspondence primarily and a few conversations). Jackson provided the correspondence to the correctional authorities and recounted the conversations. In these communications, Henderson gave conflicting statements concerning the child's location: on the one hand, she told Jackson that she could draw a map to where the child was dropped off in Missouri; on the other, that the child was with his

grandmother in Oklahoma. These communications indicated the child was still alive, contrary to what Henderson had told the FBI a few days earlier.

On 7 February, after a grand jury issued another subpoena for any maps, the State moved to compel their production. A hearing was held that same day on the motion (map hearing), at which Henderson's counsel, Icenhauer-Ramirez and Byington, as well as Byington's counsel, including Steve Brittain, were present, but Henderson was not. The next day, 8 February, the state court ruled: an attorney-client relationship existed between Henderson and Byington; any maps were *not* privileged, however, because they were made with the intent to aid law enforcement; and Byington was to produce any in her possession. She produced two that day. Using them, authorities found the child's body that same day, 8 February.

Henderson was charged the next day, 9 February 1994, with capital child murder. On 22 April 1994, she was indicted for that offense.

During extensive pre-trial hearings in 1994 and 1995, Henderson moved to suppress all evidence obtained from, *inter alia,* use of the maps. The motion was denied. Post-trial, the court prepared findings of fact and conclusions of law concerning that denial. Among other things, they provided: (1) Henderson "failed to meet [her] burden of proof at the [map] hearing . . . [and was thus] precluded from attempting to suppress any evidence . . . resulting from the production of the maps by the introduction of additional evidence which was available to [Henderson] at the time of the hearing on the motion to compel"; (2) the maps were intended to aid law enforcement in finding the

child and were not intended to be confidential; and (3) the Kansas City AFPD did not violate the attorney-client privilege during his conversations with law enforcement.

In May 1995, Henderson was found guilty of the capital murder of a child under age six, in violation of TEX. PENAL CODE ANN. § 19.03(a)(8). At the trial's penalty phase, the jury found no mitigating factors to warrant a life sentence. Henderson was sentenced to death on 30 May 1995.

On direct appeal, the Texas Court of Criminal Appeals (TCCA) affirmed. ***Henderson v. State,*** 962 S.W.2d 544, 563 (Tex. Crim. App. 1997) (en banc). After rehearing was denied in March 1998, new appellate counsel for Henderson (later serving, *inter alia,* as her appointed counsel for the instant appeal), attempted to have the mandate recalled. The attempt was based on *in-camera* comments made by the trial judge during the map hearing; counsel for the direct appeal had failed to include them in the record on appeal. (This omission is the basis for the ineffective-assistance-of-appellate-counsel claim at hand, addressed in part II.D. *infra.*) In July 1998, with one dissent, leave to withdraw the mandate was denied. ***Henderson v. State,*** 977 S.W.2d 605 (Tex. Crim. App. 1998).

Henderson next requested a writ of certiorari from the Supreme Court of the United States. It was denied. ***Henderson v. Texas,*** 525 U.S. 978 (1998).

Seeking state-habeas relief in 1998, Henderson raised 18 issues. Without holding an evidentiary hearing, the state-habeas trial court (the same judge who had presided at, *inter alia,* the map and suppression hearings and trial) recommended relief being denied. Relief was summarily

denied by the TCCA. ***Ex parte Henderson,*** No. 49984-01 (Tex. Crim. App. 6 Mar. 2002) (per curiam) (unpublished).

Henderson raised 13 issues in her federal habeas application. Pursuant to the State's summary-judgment motion, each claim was denied. ***Henderson v. Dretke***, No. A-02-CA-758-SS, slip op. at 6-8 (W.D. Tex. 31 Mar. 2004).

The district court, however, granted a COA for seven of the issues Henderson requested certified for appeal. ***Henderson v. Dretke,*** No. A-02-CA-758-SS (W.D. Tex. 15 July 2004) (unpublished COA order). In addition to the COA granted for the claimed ineffective assistance by appellate counsel on direct appeal, the court granted a COA because of its concerns that ***Cobb's*** application possibly permitted improper conduct by law enforcement officials.

On 27 January 2006, our court denied Henderson's COA request for four issues the district court had refused to certify. ***Henderson v. Dretke***, 164 F. App'x 506 (5th Cir. 2006). In April, oral argument was held on the issues certified for appeal by the district court.*

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* Approximately two weeks before the 5 April 2006 oral argument, which had been set on 17 February 2006, Henderson, supported by appointed counsel, requested that new, uncompensated counsel be permitted to present oral argument (uncompensated counsel). The uncompensated counsel apparently had been assisting Henderson since the fall of 2005 on a successive-habeas application and volunteered to serve without compensation. On 29 March 2006, we ordered that appointed and uncompensated counsel could divide the argument, which they did.

II.

In general, for "a habeas corpus appeal, we review the district court's findings of fact for clear error and review its conclusions of law de novo, applying the same standard of review to the state court's decision as the district court". ***Martinez v. Johnson***, 255 F.3d 229, 237 (5th Cir. 2001) (quoting ***Thompson v. Cain***, 161 F.3d 802, 805 (5th Cir. 1998)). Here, "[b]ecause the district court granted summary judgment to the State, this court must determine whether the record discloses any . . . issues . . . that would preclude summary judgment in the State's favor". ***Id.***; *see* FED. R. CIV. P. 56; *see also* ***Busby v. Dretke***, 359 F.3d 708, 713 (5th Cir. 2004) (reviewing a summary-judgment denial of habeas relief).

Because Henderson filed her 28 U.S.C. § 2254 application after enactment of the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, 110 Stat. 1214 (1996) (AEDPA), AEDPA controls. *See, e.g.*, ***Lindh v. Murphy***, 521 U.S. 320, 336 (1997). Pursuant to AEDPA, we may not grant relief on a claim adjudicated on its merits by the state court unless at least one of two scenarios occurs. 28 U.S.C. § 2254(d).

First, relief may not be granted "unless [that] adjudication . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States". 28 U.S.C. § 2254(d)(1) (2004); *see* ***Busby***, 359 F.3d at 713. A state-court decision is "contrary to" federal law if it relies on legal principles in direct conflict with prior Supreme Court holdings, or if it reaches a different conclusion than that reached by the Court on materially indistinguishable facts. ***Busby***, 359 F.3d at 713.

On the other hand, an "unreasonable application" occurs where, although "the state court correctly identifies the governing legal principle . . . [it] unreasonably applies it to the facts of the particular case". ***Id.*** (quoting ***Bell v. Cone***, 535 U.S. 685, 694 (2002)). In this regard, "unreasonable" requires more than that the state court applied clearly established federal law in an erroneous or incorrect manner; instead, its application must be *objectively unreasonable*. ***Rompilla v. Beard,*** 545 U.S. 374, 125 S.Ct. 2456, 2462 (2005).

The second basis for habeas relief is if the state-court adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in . . . [that] proceeding". 28 U.S.C. § 2254(d)(2). The certified issues for appeal, however, primarily, if not totally, concern subpart (d)(1) ("contrary to, or . . . unreasonable application of, clearly established Federal law").

For an AEDPA inquiry under subpart (d)(1) or (2), the state court's factual determinations are "presumed to be correct". ***Id.*** § 2254(e)(1); *see* ***Busby,*** 359 F.3d at 713. That presumption can be rebutted only by "clear and convincing evidence". 28 U.S.C. § 2254(e)(1).

Along this line, Henderson contests the presumption of correctness accorded the state-habeas affidavits and the state-habeas findings. She raised this challenge, however, for the first time in district court. As Henderson's appointed counsel acknowledged at oral argument here, in state court the affidavits were challenged or criticized only "obliquely". As we held in denying Henderson a COA, ***Henderson,*** 164 F. App'x at 517, this contention fails

because Henderson failed to contest those affidavits and findings in state court.

The seven issues certified for appeal by the district court concern the Sixth Amendment, which states in relevant part: "In all criminal *prosecutions,* the accused shall . . . have the Assistance of Counsel for his defence". U.S. CONST. amend. VI (emphasis added). Applicable to the States through the Fourteenth, the Sixth Amendment provides for the effective assistance of counsel. *E.g.,* ***United States v. Molina-Uribe,*** 429 F.3d 514, 518 (5th Cir. 2005), *cert. denied,* 126 S.Ct. 1616 (2006).

Four of the seven issues certified for appeal involve a claim of pre-trial ineffective assistance of counsel (IAC). Therefore, the issues can be reorganized into the following four claims: (1) violation of Henderson's Sixth Amendment rights by law enforcement tactics; (2) *pre-trial* IAC by the Kansas City AFPD and three of the lawyers present at the map hearing (Byington, Brittain, and Icenhauer-Ramirez); (3) violation, during the firewatch, of her Sixth Amendment rights, under ***Massiah v. United States,*** 377 U.S. 201, 206 (1964) ("hold[ing] that the petitioner was denied the basic protections of [the Sixth Amendment] guarantee when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately [and surreptitiously] elicited from him after he had been indicted and in the absence of his counsel"); and (4) IAC for her direct appeal.

As noted, for all but the appellate IAC claim, a COA was granted based on ***Cobb's*** application *vel non*. ***Henderson,*** No. A-02-CA-758-SS, slip op. at 4-5. For the reasons that follow, the state-court decision was neither

contrary to, nor an unreasonable application of, clearly established federal law (collectively, not unreasonable).

A.

The first certified issue in the district-court COA order is whether "Henderson's *Sixth Amendment rights* were violated when *state law enforcement officials* engaged in tactics that compromised the confidentiality of *Henderson's communications with her lawyer*". ***Id.*** at 2 (emphasis added). Those communications occurred in early February 1994.

In denying habeas relief for this claim, the district court held it was unexhausted and, thus, procedurally defaulted. Nonetheless, as it did for the pre-trial IAC and ***Massiah*** claims, the court granted a COA based on its alternate ruling involving ***Cobb.*** As discussed more fully in part II.B *infra* (pre-trial IAC), the district court questioned the fairness of ***Cobb's*** application.

Exhaustion of a claim in state court is required by AEDPA for a federal court to consider the claim. 28 U.S.C. § 2254(b)(1)(A). At oral argument here, Henderson's appointed counsel conceded this claim had *not* been exhausted in state court. Henderson also failed in district court to present a claimed basis to overcome this procedural bar. *E.g.*, ***Morris v. Dretke,*** 413 F.3d 484, 491-92 (5th Cir. 2005) (noting that such default may be overcome by demonstrating cause and prejudice or that failure to consider the claim would result in a fundamental miscarriage of justice). Therefore, this unexhausted claim cannot be considered.

B.

The next certified issue in the COA order is whether Henderson received *pre-trial* IAC from: the Kansas City AFPD, for "reveal[ing] a privileged communication to law enforcement officials – that Henderson had drawn a map indicating the location of the victim's body"; Byington, who "also informed law enforcement officials Henderson had drawn a map of where the victim was buried"; Brittain, for failing to "adequately safeguard Henderson's rights when he attempted to plea bargain on behalf of Henderson"; and Icenhauer-Ramirez, who "did not adequately assist [Henderson] on the matter of the map". ***Henderson,*** No. A-02-CA-758-SS, slip op. at 2-3.

In earlier denying habeas relief on this IAC claim, the district court had held Henderson had *no* Sixth Amendment right to the effective assistance of counsel for capital murder until she was so charged. The events for which Henderson claims IAC occurred no later than the map hearing on 7 February 1994; the map was produced, and the child's body located, on 8 February; and murder proceedings were *not* initiated until the next day, 9 February. Relying on ***Cobb,*** which held an accused's Sixth Amendment right to counsel does *not* attach to crimes "factually related" to the crime for which the defendant has been charged, 532 U.S. at 167-68, the district court rejected the IAC claim.

As discussed in part, *supra,* when faced subsequently with the lower COA standard, however, the district-court COA order stated the ***Cobb*** rule was "harsh" and could encourage "gamesmanship" by authorities: it could shield conduct claimed to be in relation to one charged offense that could assist in proving an anticipated new charge to

be made after that conduct. ***Henderson,*** No. A-02-CA-758-SS, slip op. at 5. Accordingly, Henderson's appellate brief seizes on this comment, asserting that the kidnapping charge (brought in January 1994 after the child disappeared while in Henderson's care, but before his body was located on 8 February 1994) was merely a pretext that enabled authorities to obtain forensic evidence that would support the subsequent 9 February murder charge.

For this IAC claim, the state-habeas trial court entered findings of fact and conclusions of law, including that each of the four attorneys was *not* constitutionally ineffective. The TCCA adopted them in denying habeas relief. The adopted bases for its holding need not be addressed in deciding, under AEDPA, whether its decision was unreasonable. As explained below, Henderson had *no* Sixth Amendment right to counsel for the child-murder charge when, prior to that charge, each of these four attorneys acted on her behalf concerning the kidnapping charge. Therefore, the TCCA's habeas-relief denial is *not* unreasonable under AEDPA.

Unlike the Fifth Amendment right against self-incrimination, the Sixth Amendment right to counsel is offense-specific. *See* ***McNeil v. Wisconsin,*** 501 U.S. 171, 175-77 (1991). Consistent with the plain language of the Sixth Amendment ("Assistance of Counsel for . . . defence" limited to "[i]n all criminal prosecutions", *see* ***Cobb,*** 532 U.S. at 173 n.3), its protections attach at arraignment or indictment for a particular offense, which "signals 'the initiation of adversary judicial proceedings' " . ***Michigan v. Jackson,*** 475 U.S. 625, 629 (1986) (quoting ***United States v. Gouveia,*** 467 U.S. 180, 187, (1984)). Only when such proceedings are initiated has a government "committed itself to prosecute, and only then [have] the adverse

positions of government and defendant . . . solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society". ***Id.*** (quoting ***Gouveia,*** 467 U.S. at 189). Accordingly, "the right to counsel granted by the Sixth . . . Amendment [] means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him". ***Maine v. Moulton,*** 474 U.S. 159, 170 (1985) (quoting ***Brewer v. Williams,*** 430 U.S. 387, 398 (1977)).

"Incriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached, are, of course, admissible at a trial of those offenses." ***Id.*** at 180 n.16. Along this line, the Supreme Court, in ***Cobb,*** clarified that its "decision in ***McNeil*** . . . meant what it said "the Sixth Amendment right is 'offense specific'" 532 U.S. at 164. The Court explained that several federal and state courts had incorrectly read into ***McNeil's*** offense-specific rule an exception for crimes "factually related" to the charged offense. ***Id.*** at 168. The decision reviewed in ***Cobb*** for that exception was, interestingly, from the TCCA, whose state-habeas decision in 2002 (post-***Cobb***) is under AEDPA review here.

No "parade of horribles" having resulted from other courts' *not* having broadened the offense-specific definition, the Court declined to create an exception to the offense-specific rule for "factually related" offenses. ***Id.*** at 171. In refusing to do so, the Court noted no evidence had been presented that such events had occurred, and observed that the claimed exception "fail[ed] to appreciate the significance of two critical considerations", ***id.***:

> First, there can be no doubt that a suspect must be apprised of his rights against compulsory self-incrimination and to consult with an attorney before authorities may conduct custodial interrogation. *See* ***Miranda v. Arizona,*** 384 U.S. at 479; ***Dickerson v. United States,*** 530 U.S. 428, 435 (2000) (quoting ***Miranda***). In the present case, police scrupulously followed ***Miranda's*** dictates when questioning [Cobb]. Second, it is critical to recognize that the Constitution does not negate society's interest in the ability of police to talk to witnesses and suspects, even those who have been charged with other offenses.

Id. at 171-72 (internal footnote omitted). In conjunction with ***Miranda's*** critical role, the Court noted it

> protect[s] a defendant's right to consult with counsel before talking to police. Even though the Sixth Amendment right to counsel has not attached to uncharged offenses, defendants retain the ability under ***Miranda*** to refuse any police questioning, and, indeed, charged defendants presumably have met with counsel and have had the opportunity to discuss whether it is advisable to invoke those Fifth Amendment rights. Thus, in all but the rarest of cases, the Court's decision today will have no impact whatsoever upon a defendant's ability to protect his Sixth Amendment right.

Id. at 171 n.2.

Cobb provided one context in which the Sixth Amendment right attaches for other offenses, holding: "even if not formally charged, [they] would be considered the same offense under the ***Blockburger*** [***v. United States,*** 284 U.S. 299 (1932) double-jeopardy] test". ***Id.*** at 173. This test

requires deciding "whether each provision [under which the defendant is charged for committing the same act] requires proof of a fact which the other does not". ***Id.*** (quoting ***Blockburger,*** 284 U.S. at 304 (alteration to ***Blockburger*** in original).

Henderson was charged with kidnapping in late January 1994 (state charge on the 23rd; federal, the 25th); she was charged with capital child murder on 9 February. Although Henderson is correct that she *could have been* charged with murder in the course of a kidnapping, under TEX. PENAL CODE ANN. § 19.03(a)(2), she was charged, instead, with the murder of a child under age six, pursuant to TEX. PENAL CODE ANN. § 19.03(a)(8). Under the ***Blockburger*** test, each offense for which she was charged requires proof of a fact that the other does not. The kidnapping charge requires that the child have been taken from his guardians, while the capital child-murder charge requires that the child have been killed. Like the burglary and capital murder offenses in ***Cobb,*** the kidnapping and capital child-murder charges here constitute separate offenses under ***Blockburger.*** *See* ***Cobb,*** 532 U.S. at 173. Henderson does *not* claim otherwise.

Cobb (2001) postdates Henderson's conviction becoming final in 1998. Pursuant to ***Teague v. Lane,*** 489 U.S. 288 (1989), a new rule of constitutional law shall *not* be applied retroactively to cases on collateral review unless one of two exceptions, *not* applicable here, are met. ***Id.*** at 307-08. (Neither ***Cobb,*** nor subsequent Court opinions, address whether ***Cobb*** was intended to have retroactive application.) As ***Teague*** explains, a new rule is created either if "it breaks new ground or imposes a new obligation on the States or the Federal Government", or "if the result was not *dictated* by precedent existing at the time the

defendant's conviction became final". ***Id.*** at 301 (emphasis in original).

Henderson does *not* contend ***Teague*** bars the State from relying on ***Cobb.*** For that reason, and because, as reflected in the above-quoted language from ***Teague,*** that decision does *not* impose a barrier where a case merely explains or clarifies an earlier Supreme Court decision, we need not speculate *sua sponte* on any such issue. ***Id.***; *cf.* ***United States v. Lopez,*** 248 F.3d 427, 432 (5th Cir.) (noting a decision may apply retroactively where it states "what conduct is, and *always has been,* criminalized" (internal quotation marks omitted) (emphasis in original)), *cert. denied,* 534 U.S. 898, (2001). As discussed, in ***Cobb,*** the Court expressed its holding as a clarification of ***McNeil*** (in 1991, prior to Henderson's conviction becoming final in 1998), which, as noted, some courts (including this circuit and the TCCA) had misinterpreted to create an exception for "factually related" or "inextricably intertwined" charges. *See* ***Cobb,*** 532 U.S. at 168; ***United States v. Walker,*** 148 F.3d 518, 529 (5th Cir. 1998) (explaining, pre-***Cobb,*** that Sixth Amendment "protections cover [different] offenses" when they are "inextricably intertwined", defined as "whether the conduct leading to each offense is the same"). The Court made clear that, based on *its* existing precedent, as opposed to that of courts which strayed from its ***McNeil*** holding, the result in ***Cobb*** was *dictated by precedent.* ***Cobb,*** 532 U.S. at 168.

In essence, Henderson seeks an exception to ***Cobb,*** claiming her factual situation presents the "parade of horribles" that did not occur in ***Cobb.*** *See* 532 U.S. at 171. ***Teague*** arguably bars Henderson's attempt to create a new-rule exception to ***Cobb.*** In any event, her factual situation would *not* fit in such a parade. For example,

there is no claim she did not receive her ***Miranda*** warnings. Moreover, as noted *supra,* her pre-trial motion, subsequent to the map hearing, to suppress the evidence (maps) produced as a result of that hearing, was heard extensively and denied.

Following being charged with kidnapping, Henderson did *not* have a Sixth Amendment right to counsel for capital child murder when each of the attorneys acted on her behalf prior to her being so charged. Accordingly, she may not, for the pre-trial conduct at issue, claim IAC for that charge.

C.

The district court granted a COA for whether "Henderson's Sixth Amendment right to effective assistance of counsel was violated under the rule announced in ***Massiah*** . . . when the police placed her under fire watch [in early February 1994, prior to the 9 February murder charge] in order to obtain incriminating statements from her". ***Henderson,*** No. A-02-CA-758-SS, slip op. at 3. As for the pre-trial IAC claim, the court granted a COA, however, because of its earlier-discussed concern that, although Henderson had *not* been charged with capital murder until post-firewatch, permitting, based on ***Cobb,*** what transpired during the firewatch would encourage "gamesmanship" by authorities. ***Id.*** at 5.

Massiah (1964) held a criminal defendant may not have "used against him at his trial evidence of his own incriminating words, which federal agents had deliberately [and surreptitiously] elicited from him after he had been indicted and in the absence of his counsel". 377 U.S. at 206. A ***Massiah*** violation has three elements: (1) the

Sixth Amendment right to counsel has attached; (2) the individual seeking information from the defendant is a government agent acting without the defendant's counsel's being present; and (3) that agent "deliberately elicit[s]" incriminating statements from the defendant. ***Id.***; ***Creel v. Johnson***, 162 F.3d 385, 393 (5th Cir. 1998), *cert. denied*, 526 U.S. 1148 (1999). The relevant state-habeas trial court's findings and conclusions included finding Jackson did *not* act as an agent for the State in interacting with Henderson. The TCCA adopted those findings and conclusions in denying this claim.

As in *Cobb*, the Sixth Amendment right to counsel under ***Massiah*** is offense-specific; this right cannot be violated until Sixth Amendment protections attach. ***Walker***, 148 F.3d at 528-29. Again, they do so at arraignment or indictment for a particular offense. ***Michigan***, 475 U.S. at 629.

As discussed *supra*, Henderson's Sixth Amendment rights for capital child murder did not attach before 9 February, when formal criminal proceedings were initiated against her for that offense. All communications with Jackson took place earlier, between 5 and 8 February. Because Henderson's offense-specific Sixth Amendment right to counsel for capital child murder had not attached when she communicated with Jackson, no ***Massiah*** violation could occur. *See* ***Massiah***, 377 U.S. at 206. Therefore, it is *not* necessary to consider the other elements required for a ***Massiah*** violation.

D.

"A criminal defendant has a constitutional right to receive effective assistance of counsel on direct appeal."

United States v. Phillips, 210 F.3d 345, 348 (5th Cir. 2000). The final issue certified for appeal in the district-court COA order concerns the direct appeal to the TCCA: whether "Henderson's Sixth Amendment right to effective assistance of counsel was violated because she received constitutionally inadequate assistance from her appellate counsel". ***Henderson,*** No. A-02-CA-758-SS, slip op. at 3.

An IAC claim involves the very familiar two-prong requirement under ***Strickland v. Washington,*** 466 U.S. 668 (1984): deficient performance and resulting prejudice. ***Id.*** at 687. The IAC standards applied to trial counsel apply to appellate counsel as well. *See, e.g.,* ***Busby,*** 359 F.3d at 714 (applying ***Strickland*** test to appellate counsel's performance).

Of course, for our AEDPA review of a state-habeas denial of an IAC claim, we do *not* decide whether IAC has been established. That is the role of the state court. As our court has repeatedly explained,

> the test for [AEDPA] purposes is *not* whether [the petitioner made the showing required under ***Strickland***]. Instead, the test is whether the state court's decision – that [the petitioner] did *not* make the ***Strickland*** – showing-was contrary to, or an unreasonable application of, the standards, provided by the clearly established federal law (***Strickland***), for succeeding on his [IAC] claim.

Id. at 717, 104 S.Ct. 2052 (first alteration added; other alterations and emphasis in original) (quoting ***Schaetzle v. Cockrell,*** 343 F.3d 440, 444 (5th Cir. 2003)). Accordingly, supporting evidence for the two-prong ***Strickland*** test is reviewed under the AEDPA lens in deciding

whether the state-court decision satisfies AEDPA's reasonableness standard.

Therefore, in state court, for the first prong of the ***Strickland*** test, Henderson had to "demonstrate that [appellate] counsel's representation 'fell below an objective standard of reasonableness'". ***Soffar v. Dretke,*** 368 F.3d 441, 472 (5th Cir. 2004) (quoting ***Strickland,*** 466 U.S. at 688). Next, the prejudice prong required Henderson in state court to "establish a 'reasonable probability that, but for [appellate] counsel's unprofessional errors, the result of the proceeding would have been different'". ***Id.*** at 478 (quoting ***Strickland,*** 466 U.S. at 694). This required showing an error "sufficient to undermine confidence in the outcome". ***Strickland,*** 466 U.S. at 694. Under this prong for an appellate IAC claim, "we must counterfactually determine the probable outcome on appeal had" the performance not been deficient. ***United States v. Reinhart,*** 357 F.3d 521, 530 (5th Cir. 2004) (internal quotation marks omitted).

Appellate IAC is usually claimed where counsel fails to raise a particular issue on appeal; in that context, "[a]ppellate counsel is not deficient for not raising every non-frivolous issue on appeal". ***Id.*** at 525. Where, as here, the habeas petitioner instead challenges appellate counsel's failure to provide an appellate court with the necessary parts of the record, we find less guidance. In ***Goodwin v. Johnson,*** 132 F.3d 162 (5th Cir. 1997) (reviewed under pre-AEDPA standards), the petitioner claimed IAC because of counsel's failure to include in the record on appeal the full transcript of a pretrial suppression hearing. ***Id.*** at 176. Our court disagreed, explaining that, even had the appellate court possessed the missing

testimony, it would still be required to accept the trial court's credibility determinations. ***Id.***

"The appellate process exists solely for the purpose of correcting errors that occurred at the trial court level." ***Id.*** at 174. Consequently, the right to effective counsel on appeal " 'is recognized not for its own sake, but because of the effect that it has on the ability of the accused to receive a fair trial' ". ***Id.*** (quoting ***Lockhart v. Fretwell,*** 506 U.S. 364, 369 (1993) (alteration to ***Lockhart*** in original)).

Henderson claims IAC because, in conducting her direct appeal, appellate counsel failed to notice a span of pages missing from the record, and thus failed to include them in the record on appeal for the TCCA. The missing pages contained an *in-camera* colloquy, during the 7 February 1994 map hearing, between the state trial judge and Henderson's counsel, Byington, in which the judge expressed his belief the child was dead.

As discussed *supra,* on 8 February 1994, the judge compelled production of any maps in Byington's possession on the basis that Henderson was represented by the attorneys present at the hearing and that, despite the attorney-client privilege, any maps were created to aid law enforcement. Henderson deems this missing portion of the record critical, claiming it would have shown the unreasonableness of any belief by law-enforcement officials that the child was still alive.

As also discussed *supra,* this was the basis for seeking unsuccessfully in 1998 to have the TCCA withdraw its mandate following its affirmance on direct appeal. This claim was next raised in the state-habeas application.

Accompanying the state's response to that application were several affidavits. Among them were two by Henderson's appellate counsel, in which he stated: he read the 44-volume record "more than once"; and he "did not see or know about the *in camera* colloquy between [the] Judge . . . and Byington before [he] wrote [his appellate] brief, and therefore did not use it on direct appeal". Both of these affidavits were found "true" by the state-habeas trial court, which "conclude[d] that [counsel's] representation of [Henderson] on appeal was competent". As noted, the TCCA adopted those findings and conclusions.

We need not address, through the AEDPA filter, the first of the two prongs for showing IAC: the state-court decision concerning whether counsel's failure to notice, or to supplement, this missing portion of the record constituted deficient performance. Instead, because Henderson had to satisfy both prongs in state court, we proceed to review that decision as it concerns the second, prejudice, prong. Pursuant to our restricted AEDPA review, the state-court decision on this IAC claim was not unreasonable because, in counter-factually determining the likely outcome, we conclude the TCCA on direct appeal would have reached the same conclusion had it possessed the missing transcript. *See* ***Reinhart,*** 357 F.3d at 530.

As the district court explained in denying Henderson habeas relief on this issue, "what mattered . . . [for the direct] appeal was whether the [map-hearing] trial judge believed the law enforcement officers when they said they thought there was a chance [the child] was still alive, *not* what the trial judge himself believed about whether [the child] was alive". ***Henderson,*** No. A-02-CA-758-SS, slip op. at 28 (emphasis added). Indeed, on direct appeal, the TCCA emphasized the importance of the law-enforcement

authorities' belief, despite considerable evidence to the contrary: "At the time the trial court compelled production of the maps, authorities had reason to believe that the baby might still be alive". ***Henderson,*** 962 S.W.2d at 557. For example, during the firewatch shortly before the map hearing, Henderson communicated to Jackson that the child was still alive. Although the TCCA, on direct appeal, did not have the judge's *in-camera* statement before it, its subsequent discussion during state-habeas proceedings of the conflicting information provided by Henderson acknowledged what the TCCA ruled on direct appeal. For that direct appeal, it stated: it was likely a "remote possibility" that the child remained alive; authorities, nonetheless, "were entitled to pursue that remote possibility". ***Id.*** Under AEDPA, the state-habeas denial of this claim was not unreasonable.

III.

For the foregoing reasons, the denial of habeas relief is

AFFIRMED.

APPENDIX B

164 Fed. Appx. 506

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 04-70032

CATHY HENDERSON,

Petitioner-Appellant,

versus

Douglas DRETKE, Director, Texas Department of Criminal Justice, Correctional Institutions Division,

Respondent-Appellee.

Appeal from the United States District Court for the Western District of Texas (A-02-CA-758-SS)

(Filed January 27, 2006)

Before JONES, Chief Judge, and BARKSDALE and PRADO, Circuit Judges.

PER CURIAM:*

In 1995, Cathy Lynn Henderson was convicted in Texas state court of capital child murder, *see* TEX. PENAL CODE ANN. § 19.03(a)(8), and sentenced to death. After

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

federal habeas relief was denied on all 13 claims, the district court granted a certificate of appealability (COA) for six of them, as well as a portion of another.

Henderson seeks a COA from this court for four of the remaining issues for which the district court denied a COA: (1) whether her Fifth and Fourteenth Amendment rights were violated because her confession to an FBI Agent was involuntary and coerced; (2) whether, shortly after she was arrested for kidnapping the child she later confessed to killing, her Sixth Amendment confrontation and Fourteenth Amendment due process rights were violated by the trial court's denial of her request to be present at the hearing on the State's motion to compel the production of evidence needed for the grand jury proceeding; (3) whether her Sixth Amendment right to effective assistance of counsel was violated by her trial counsel; and (4) whether her Sixth Amendment confrontation and Fourteenth Amendment due process rights were violated by the trial court's post-trial findings of fact and conclusions of law regarding its pre-trial denial of Henderson's motion to suppress evidence.

For each of the four issues, a COA is **DENIED.** A subsequent opinion will address the numerous issues certified by the district court.

I.

On the morning of 21 January 1994, the Baughs left their three-and-one-half month old son, Brandon (the child), with Henderson. Later that day, the child received massive head trauma, causing his death.

Soon thereafter, on 23 and 25 January, respectively, state and federal warrants were issued against Henderson

for the felony offense of kidnapping. Approximately a week later, on 1 February, the FBI arrested Henderson in Kansas City, Missouri.

During her interrogation by FBI Agent Napier, Henderson initially denied knowledge of the child's whereabouts and stated she had left him with his grandmother; then, she offered to provide information about the child in exchange for an agreement that she remain in Missouri. The Agent advised that he did not have authority to negotiate such an agreement but that those who did would need information on which to base their decision. Henderson soon confessed to killing the child, claiming it was an accident, and to burying him in a wooded area near Waco, Texas. When Agent Napier asked Henderson to draw a map to the burial site, she refused. After the Agent reduced Henderson's comments to writing, she refused to sign the statement and requested a lawyer.

Later that day, Henderson met with Ronald Hall, an assistant federal public defender (AFPD) in Kansas City, and Ronald Ninemire, chief investigator for the federal public defender's office. Concluding that he needed a Texas map to facilitate Henderson's cooperation with authorities' efforts to locate the child, AFPD Hall requested one from FBI Agent Hepperman. Unsure of the reason for that request, the Agent did not assist AFPD Hall. Accordingly, he obtained a map from Ninemire's office in another building and asked Henderson to draw a map to the burial site. At some point, Henderson did so.

After his interview with Henderson, AFPD Hall met with several persons in law enforcement, including Carla Oppenheimer, an Assistant United States Attorney (AUSA), and Agent Hepperman. AFPD Hall opined that

the child was dead. In addition, Agents testified at trial that: AFPD Hall told them Henderson had drawn a detailed map to the burial site; and Hall could find it using the map. AFPD Hall denies making these statements or ever giving the Agents any indication of any map's existence. In any event, Agent Hepperman and AUSA Oppenheimer formed the subjective belief that any map was made with the intent of aiding law enforcement.

The next day, 2 February, AFPD Hall faxed maps prepared by Henderson to Nona Byington, Henderson's counsel in Texas, where the case was being investigated by Travis County Sheriff Keel. Law enforcement officers, who had learned from AFPD Hall that he intended to send materials to Byington, contacted her and requested the maps. After Byington attempted unsuccessfully to negotiate a plea agreement in exchange for the maps, she refused to provide any in her possession. Because of her refusal, Sheriff Keel publicly accused Byington of being an accomplice in an ongoing crime. (Byington's subsequent defamation action against Sheriff Keel was settled.)

On 3 February, Texas lawyer Linda Icenhauer-Ramirez was appointed to represent Henderson on state kidnapping charges. That same day, a Travis County grand jury issued a subpoena *duces tecum* for Byington to appear with any maps. She refused, claiming attorney-client privilege. An arrest warrant was issued for Byington, as well as a search warrant for her automobile and house. The arrest warrant was soon withdrawn. Authorities executed the search warrant but did not find any maps.

Earlier, on 2 February, Henderson (who waived extradition) had been returned to Texas. While in custody

there, Henderson was placed in solitary confinement under "firewatch", a procedure whereby inmates monitor another inmate for safety reasons. During "firewatch", between 5 and 8 February, Henderson befriended inmate Bolivia Jackson. Jackson communicated with Henderson on numerous occasions (correspondence primarily and a few conversations). Jackson provided the correspondence to the correctional authorities, as well as recounting the conversations. In these communications, Henderson gave conflicting statements concerning the child's location. On the one hand, she told Jackson that she could draw a map to where the child was dropped off in Missouri; on the other, that the child was with his grandmother in Oklahoma.

On 7 February, after a grand jury issued another subpoena for any maps, the State moved to compel their production. Following a hearing on that motion (map hearing), at which Henderson's counsel, Linda Icenhauer-Ramirez and Nona Byington, as well as Byington's counsel, were present, *but Henderson was not,* the state court held: an attorney-client relationship existed between Henderson and Byington; but, any maps were *not* privileged because they were made with the intent to aid law enforcement. Upon being ordered to produce any maps in her possession, Byington produced two. Using the maps, authorities found the burial site.

Henderson was charged on 9 February, and indicted on 22 April, for the capital murder of the child. During pre-trial hearings, which occurred over several months in 1994 and 1995, Henderson moved to suppress all evidence obtained from, *inter alia,* the use of the maps. The motion was denied. *Post-trial,* the court prepared findings of fact and conclusions of law concerning that denial, including:

(1) Henderson "failed to meet [her] burden of proof at the [map] hearing . . . [and was thus] precluded from attempting to suppress any evidence . . . resulting from the production of the maps by the introduction of additional evidence which was available to [Henderson] at the time of the hearing on the motion to compel"; (2) the maps were intended to aid law enforcement in finding the child and were not intended to be confidential; (3) AFPD Hall did not violate the attorney-client privilege during his conversations with law enforcement; (4) the crime-fraud exception to that privilege applied because there was evidence of an ongoing kidnapping at the time of the map hearing; (5) even if law enforcement knew the child was dead, the crime-fraud exception still applied because of the ongoing crime of abuse of a corpse; (6) even if the maps were privileged, the fruit of the poisonous tree doctrine did not compel suppression; and (7) Henderson was not denied effective assistance of counsel.

On 17 May 1995, Henderson was found guilty of the capital murder of a child under age six. After the jury found, *inter alia,* no mitigating factors to warrant a life sentence, Henderson was sentenced to death on 30 May 1995.

On direct appeal, the Texas Court of Criminal Appeals affirmed. ***Henderson v. State,*** 962 S.W.2d 544, 563 (Tex. Crim. App. 1997) (en banc) (***Henderson I***). The Supreme Court of the United States denied a writ of certiorari. ***Henderson v. Texas,*** 525 U.S. 978 (1998).

In seeking state habeas relief in 1998, Henderson raised 18 grounds. Without holding an evidentiary hearing, the state habeas court recommended relief being denied. In findings of fact and conclusions of law, the court

found to be "true" the affidavits of Robert and Linda Icenhauer-Ramirez (Henderson's trial counsel), Keith Hampton (Henderson's counsel on direct appeal), Sheriff Keel (Travis County Sheriff who investigated the child's disappearance), and Robert Smith (an Assistant District Attorney who prosecuted Henderson's case). The Texas Court of Criminal Appeals summarily denied habeas relief. ***Ex parte Henderson,*** No. 49984-01 (Tex. Crim. App. 6 Mar. 2002) (per curiam) (unpublished).

Henderson sought federal habeas relief, raising 13 grounds. ***Henderson v. Dretke,*** No. A-02-CA-758-SS, slip op. at 6-8 (W.D. Tex. 31 Mar. 2004) (***Henderson II***). Relief was denied. The district court granted Henderson a COA for six of the issues, as well as part of another: (1) whether Henderson's Sixth Amendment rights where violated when state law enforcement officials' tactics undermined the confidentiality of Henderson's communications with her attorney; and (2)-(7) whether Henderson's Sixth Amendment right to effective assistance of counsel was violated: (2) when AFPD Hall revealed to law enforcement that Henderson had drawn the map; (3) because Henderson's initial Texas counsel, Byington, also told law enforcement officials that Henderson had drawn the map; (4) when Steve Brittain (Nona Byington's attorney at the map hearing) failed to adequately protect Henderson's rights when he attempted to plea-bargain on Henderson's behalf; (5) when, at the map hearing, Linda Icenhauer-Ramirez, appointed trial counsel, did not adequately help prevent disclosure of the maps (this is the portion of the IAC claim concerning Linda Icenhauer-Ramirez for which a COA was granted; it was denied concerning trial); (6) because her appellate counsel, Keith Hampton, provided constitutionally inadequate assistance; and (7) when the police placed

her under "firewatch" to obtain incriminating statements, in violation of ***Massiah v. United States,*** 377 U.S. 201, 206 (1964) (holding that "the petitioner was denied the basic protections of [the Sixth Amendment] guarantee when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel"). A COA was denied for all other claims. ***Henderson v. Dretke,*** No. A-02-CA-758-SS (W.D. Tex. 15 July 2004) (unpublished order) (***Henderson III***).

II.

Henderson seeks a COA here. Her 28 U.S.C. § 2254 habeas petition is subject to the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (AEDPA). *See, e.g.,* ***Lindh v. Murphy,*** 521 U.S. 320, 336 (1997). Under AEDPA, she must first obtain a COA from either the district, or our, court before she can appeal the denial of a federal habeas claim. 28 U.S.C. § 2253(c) (2000); FED. R. APP. P. 22(b)(1); ***Slack v. McDaniel,*** 529 U.S. 473, 478 (2000). Federal Rule of Appellate Procedure 22(b)(1) requires that the district court first decide whether to grant the COA. Henderson filed a notice of appeal and request for a COA in district court. As discussed, it granted a COA for six issues and part of another and denied it for the others, including those addressed *infra.*

Henderson seeks a COA for four of the issues the district court refused to certify for appeal. (Henderson's COA request included a fifth issue: whether the "firewatch" violated ***Massiah***. As Henderson recognized, but

only *after* the State noted this erroneous COA request here, and as described above, the district court granted a COA for that issue. ***Henderson III,*** slip op. at 5. Therefore, we do *not* address it. Instead, it will be addressed in our subsequent opinion concerning the issues certified for appeal by the district court. On the other hand, this erroneous request is in line with other errors and shortcomings in the COA request to our court, discussed *infra.*)

Therefore, at issue are the COA requests for the following claims: (1) Henderson's Fifth and Fourteenth Amendment rights were violated because her statement to FBI Agent Napier in Missouri was involuntary and coerced; (2) Henderson's Sixth Amendment confrontation and Fourteenth Amendment due process rights were violated when the trial court refused to allow Henderson to be present at the map hearing; (3) Henderson's Sixth Amendment right to effective assistance of counsel was violated by her trial counsel, Linda and Robert Icenhauer-Ramirez; and (4) Henderson's Sixth Amendment confrontation and Fourteenth Amendment due process rights were violated by the trial court's post-trial findings of fact and conclusions of law concerning its pre-trial denial of her suppression motion.

To obtain a COA, Henderson must "ma[k]e a substantial showing of the denial of a constitutional right". 28 U.S.C. § 2253(c)(2); *see* ***Miller-El v. Cockrell,*** 537 U.S. 322, 336 (2003). Restated, she must demonstrate "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further". ***Miller-El,*** 537 U.S. at 336 (quoting ***Slack,*** 529 U.S. at 484) (internal quotation marks omitted). "This threshold

inquiry does not require full consideration of the factual or legal bases adduced in support of the claims." ***Id.*** Instead, it "requires an overview of the claims in the habeas petition and a general assessment of their merits". ***Id.*** This being a death-penalty case, all doubts regarding "whether a COA should issue must be resolved in [Henderson's] favor". ***Hernandez v. Johnson,*** 213 F.3d 243, 248 (5th Cir.), *cert. denied,* 531 U.S. 966 (2000).

Of course, for making this required threshold inquiry, we must be mindful of AEDPA's standards for merits-rulings. Under AEDPA, for deciding a claim, a federal court must defer to the state court's resolution of that claim concerning questions of law and mixed questions of law and fact, unless that "decision . . . was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court". 28 U.S.C. § 2254(d)(1); *see* ***Hill v. Johnson,*** 210 F.3d 481, 488 (5th Cir. 2000), *cert. denied,* 532 U.S. 1039 (2001). "A state court's decision is . . . contrary to clearly established federal law if it reaches a legal conclusion in direct conflict with a prior decision of the Supreme Court or if it reaches a different conclusion than the Supreme Court based on materially indistinguishable facts." ***Miniel v. Cockrell,*** 339 F.3d 331, 337 (5th Cir. 2003), *cert. denied,* 540 U.S. 1179 (2004).

Similarly, in deciding a claim pursuant to AEDPA, a federal court must defer to the state court's factual findings unless they "resulted in a decision that was based on an unreasonable determination of the facts in [the] light of the evidence presented in the State court proceeding". 28 U.S.C. § 2254(d)(2). These findings are entitled to a presumption of correctness, which can be rebutted only by "clear and convincing evidence". ***Id.*** § 2254(e)(1).

Throughout her COA application here, which is often difficult to decipher, Henderson attempts to *incorporate* additional materials. Under both Federal Rule of Appellate Procedure 28(a)(9)(A) and local rules 28.2.3 and 28.3(j), Henderson may not do so. Therefore, they will *not* be considered as part of Henderson's COA application here.

A.

First, Henderson contends she is entitled to a COA because reasonable jurists could debate whether FBI Agent Napier violated her Fifth and Fourteenth Amendment rights by causing an involuntary and coerced confession. Henderson raised this issue on direct appeal.

During her interrogation by Agent Napier, Henderson confessed to killing and burying the child. The Texas Court of Criminal Appeals described this interrogation as follows:

> Early in the interview, Agent Napier told [Henderson] that she was at a crossroads, that she could determine which path to take, and that she could tell her story or let the justice system take its course. Later in the interview, [Henderson] offered to tell everything she knew in exchange for staying in Missouri. In response, Napier asked questions such as: "What do you mean?" "What's everything?" *Napier never promised appellant that she could stay in Missouri, and in fact, told her that he was not in a position to make any bargains, deals, or promises.* He also told her that the people in a position to make a deal would want to have a basis for making their decision. Later, through leading questions, Napier elicited from [Henderson] a confession that she

> killed the baby. He asked [Henderson], "When you say the whole thing, are you talking about that Brandon is dead, that you know where the body's located, that it was an accident, that you're sorry?" [Henderson] responded by nodding her head. Later Napier stated, "Brandon's dead. It was an accident." To this statement, [Henderson] replied, "Yes." Napier asked, "Did you bury him[?]" [Henderson] responded, "Of course, I did. He's just a baby." Subsequent interrogation led to [Henderson's] statement that she had buried Brandon in a wooded area near Waco. At that point, Napier asked [Henderson] to draw a map so that the authorities could find Brandon. Napier talked about Brandon's parents and talked about their need to "put closure" on this episode. [Henderson], however, refused to draw a map.

Henderson I, 962 S.W.2d at 563-64 (emphasis added).

Applying AEDPA's presumption of correctness, the district court adopted the Texas Court of Criminal Appeals' rulings on direct appeal that: Agent Napier made no promises to, or deals with, Henderson in exchange for her statement; and she confessed *before* Agent Napier discussed the parents' need for closure. Henderson claims her confession to Agent Napier was involuntary and coerced because: (1) she was led to believe that cooperation with the FBI would lead to a deal; and (2) Agent Napier's having discussed the child's parents' need for closure and help in recovering the child's body, Henderson's resulting confession was not an act of free will.

Henderson fails, however, to provide any record support, much less the clear and convincing evidence as mandated by AEDPA, for her contentions. 28 U.S.C.

§ 2254(e)(1). Jurists of reason would *not* disagree that the issue of whether Henderson's confession was involuntary and coerced is *not* "adequate to deserve encouragement to proceed further". ***Miller v. Dretke,*** 404 F.3d 908, 913 (5th Cir. 2005) (citing ***Miller-El,*** 537 U.S. at 336.

B.

Henderson next seeks a COA on whether her Sixth Amendment confrontation and Fourteenth Amendment due process rights were violated because: the trial judge denied her request to be present at the 7 February 1994 map hearing; her rights were not adequately protected at that hearing; and Henderson's then-counsel, Byington, was compelled to produce the maps, which were then used to find the child's burial site.

Henderson's unsupported allegations contrast with Linda Icenhauer-Ramirez's state habeas affidavit, which was found "true". (Henderson's failed attack on the affidavit is discussed in part II.C., concerning her ineffective assistance of counsel claims.) That affidavit maintains Henderson was adequately represented at the map hearing. Although Henderson emphasizes that Linda Icenhauer-Ramirez did not meet with Byington's counsel on the day of the map hearing, or have any discussions with Byington's counsel during that hearing, Ms. Icenhauer-Ramirez's affidavit stated:

> [Henderson]'s attorney seems to be asserting that Cathy Henderson's rights were not protected during the [map hearing]. It was clear to everyone at the time and should be clear to [Henderson]'s attorney now that Nona Byington was still one of Cathy Henderson's attorneys at the time of the [map hearing]. Nona Byington fully represented

> her client and protected her interests during that hearing. Cathy Henderson was in no way hurt by the actions of any of her attorneys during that time.

Because Henderson did *not* raise these claims on *direct appeal,* the state habeas court held they were procedurally defaulted. *See* ***Ex parte Townsend,*** 137 S.W.3d 79, 81 (Tex. Crim. App. 2004) ("Because the applicant did not raise the issue on direct appeal, the applicant has forfeited his claim [on habeas review].").

"The procedural-default doctrine precludes federal habeas review when the last reasoned state-court opinion addressing a claim explicitly rejects it on a state procedural ground." ***Matchett v. Dretke,*** 380 F.3d 844, 848 (5th Cir. 2004). "Where, as here, a state court clearly and expressly states that its judgment rests on a state procedural bar, a presumption arises that the state court decision rests on independent and adequate state law grounds." ***Pitts v. Anderson,*** 122 F.3d 275, 279 (5th Cir. 1997).

> The procedural default doctrine, resting on our confinement to review of federal questions, precludes federal habeas review when the last reasoned state court opinion addressing a claim explicitly rejects it on a state procedural ground. . . . The doctrine presumes that a state procedural ground is adequate and independent – the rule must, for instance, be regularly followed – and, ordinarily, the *burden is on the habeas petitioner to demonstrate otherwise.*

Hughes v. Johnson, 191 F.3d 607, 614 (5th Cir. 1999) (emphasis added), *cert. denied,* 528 U.S. 1145 (2000).

If the state court relies on an adequate and independent state procedural rule, then federal habeas review is barred unless the petitioner can show either (1) cause and prejudice or (2) that not addressing the claim will result in a fundamental miscarriage of justice. ***Coleman v. Thompson***, 501 U.S. 722, 750 (1991); ***Smith v. Johnson***, 216 F.3d 521, 523-24 (5th Cir. 2000).

Although the district court noted the procedural default holding by the state habeas court, it addressed instead alternative holdings by that court: Henderson did not have a right to be present at the map hearing; and even if she did, her absence was harmless error because she addressed the subject of that hearing in her subsequent suppression motion hearings. The district court held:

> It is far from clear that Henderson's absence from the February 7, 1994 [map] hearing in any way implicated her right to confrontation guaranteed under the Sixth and Fourteenth Amendments, considering: (1) the hearing took place before trial commenced and during the grand jury investigation; (2) the attorneys who represented Byington at the [map] hearing vigorously defended that the map was protected by attorney-client privilege and cross-examined the State's witnesses; and (3) Henderson later had a chance to cross-examine the witnesses and present evidence in support of her position during the pre-trial hearings on her motions to suppress the map. At the very least, the Court cannot hold the state habeas court *unreasonably* applied clearly established federal law in concluding Henderson did not have a right to be at the map hearing.

Henderson II, slip op. at 33-34 (internal footnote and citations omitted). In the alternative, the district court held the state habeas court's holding that any error was harmless was not unreasonable in the light of the "extensive hearings" on the suppression motion. ***Id.*** at 34.

Henderson has *not* demonstrated she is entitled to a COA on this issue. In the light of the district court's holdings, she has failed to demonstrate that reasonable jurists would debate whether these claims should have been resolved by the district court in a different manner or that they deserve to proceed further.

C.

Henderson claims she is entitled to a COA on whether she received ineffective assistance of counsel (IAC) from trial counsel Linda and Robert Icenhauer-Ramirez. (Byington, who represented Henderson concerning the map production, ended her representation *prior to trial.*) Henderson's appointed lead trial counsel was Linda Icenhauer-Ramirez, who requested that her then-husband, Robert Icenhauer-Ramirez, be appointed co-counsel. Ms. Icenhauer-Ramirez remained lead counsel throughout trial. Mr. Icenhauer-Ramirez withdrew and was replaced. (Henderson has not asserted IAC against the replacement. Henderson was appointed new counsel, Keith Hampton, for her direct appeal.)

In deciding whether to grant a COA on any of Henderson's five IAC claims, our required threshold inquiry must include an overview of the well-established two-prong test for those claims. On the merits, Henderson was required to show: (1) counsel's representation fell below professional norms (deficient-performance prong); *and* (2) a reasonable

probability exists that, but for that deficiency, the trial's result would have been different (prejudice prong). ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

Under the first prong, counsel "has [the] duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial" proceeding. ***Id.*** at 688. The proper standard is "simply reasonableness under prevailing professional norms". ***Id.*** In making this determination, the totality of the circumstances are considered. On the other hand, "[j]udicial scrutiny of counsel's performance must be highly deferential". ***Id.*** at 689.

Under the second prong, at issue is whether there is a reasonable probability that counsel's deficient performance rendered the proceeding's result unreliable and, therefore, unfair. ***Id.*** at 694. This requires a showing that counsel's performance "actually had an adverse effect on the defense". ***Id.*** at 693.

Again, for COA purposes, we do not fully consider the merits of Henderson's IAC claims. Instead, we decide only whether "reasonable jurists could debate whether . . . [Henderson's claims] should have been resolved in a different manner or that [they] were adequate to deserve encouragement to proceed further". ***Miller-El***, 537 U.S. at 336 (quoting ***Slack***, 529 U.S. at 484) (internal quotation marks omitted). In deciding this COA issue, we must assume the last state habeas court (Texas Court of Criminal Appeals) applied ***Strickland's*** two-prong analysis, even though the decision was rendered without a written opinion. ***Henderson II***, slip. op. at 19 (citing ***Catalan v. Cockrell***, 315 F.3d 491, 493 (5th Cir. 2002)). (As noted, the state habeas trial court entered findings and conclusions, including the conclusion that Henderson's trial counsel did

not provide constitutionally ineffective assistance, although it did not discuss the two-prong analysis in its findings and conclusions.)

As a preliminary matter, Henderson contends that, even though the state habeas court found them "true", the affidavits of Robert and Linda Icenhauer-Ramirez (trial counsel), Keith Hampton (appellate counsel), Sheriff Keel, and Assistant District Attorney Robert Smith (prosecutor) should not be entitled to the 28 U.S.C. § 2254(e)(1) presumption of correctness. Henderson neither challenged these affidavits after the State presented them with its reply to Henderson's state habeas petition, nor did she challenge them on federal habeas review in district court (either in her habeas petition or in her response to the State's summary judgment motion). Not until her COA request to the district court did Henderson challenge the "truth" of the affidavits. Needless to say, this was far too late; we will not consider Henderson's challenge to those affidavits. (Along this line, Henderson contends in her COA request here that she should have been granted an evidentiary hearing in district court to resolve asserted factual disputes in those affidavits. The record does *not* reflect, however, that in district court Henderson *ever* requested, or was denied, an evidentiary hearing.)

We note that, even if Henderson had preserved this challenge, in order to rebut a state habeas court's factual findings, she must present, on the merits, "clear and convincing" evidence to the contrary. *See* 28 U.S.C. § 2254(e)(1). Instead, Henderson only briefs whether the affidavits of Robert and Linda Icenhauer-Ramirez and Sheriff Keel are "clearly erroneous". (Only against Linda Icenhauer-Ramirez does she even raise any arguably substantive claims; against Robert Icenhauer-Ramirez and

Sheriff Keel, Henderson makes personal attacks, which lack *any* record support.) Moreover, any contentions she may have had regarding Hampton's and Smith's affidavits are waived because of Henderson's failure to discuss them in her COA application, either to the district, or our, court.

Henderson claims she is entitled to a COA because trial counsel Linda and Robert Icenhauer-Ramirez were ineffective in five respects. None of the claims satisfies the standard for a COA.

1.

Henderson first asserts a COA should issue for her contention that Linda Icenhauer-Ramirez failed to pursue claims that law enforcement eavesdropped on the "red room" while Henderson was originally detained in Missouri. (This alleged conduct was apparently in order to determine that Henderson had prepared the map(s).) That room was where Henderson was originally interviewed in Missouri by AFPD Hall and investigator Ninemire. According to Henderson, Ms. Icenhauer-Ramirez stated that Henderson was eavesdropped upon in that room. In support, Henderson references a private investigator's affidavit that Ms. Icenhauer-Ramirez told him this was her *belief*. Henderson does *not* cite to Ms. Icenhauer-Ramirez's treatment of this issue at trial or her state habeas affidavit where she discusses her investigation of the possible eavesdropping.

Even assuming as true the statement attributed to Ms. Icenhauer-Ramirez, Henderson is not entitled to a COA for this issue because reasonable jurists would *not* debate whether the district court correctly resolved this

issue against Henderson. In her state habeas affidavit, Ms. Icenhauer-Ramirez stated:

> I traveled to Kansas City prior to the pretrial hearings and prior to Dayna Blazey's and Robert Smith's [Texas Assistant District Attorneys assigned to Henderson's case] trip to Kansas City. I spent several hours with [AFPD] Hall and Ron Ninemire at their office. They were very open about their involvement in the case and they even took me across the street to the Federal Courthouse and showed me the "red room"; the hallway where Ron Hall talked to the FBI agents, the assistant U.S. attorney, and the two Travis County deputies; and the adjacent courtroom. As a result of that visit, I was familiar with the "red room" and the potential that someone might have eavesdropped on the[ir] conversation [with Henderson on 1 February 1994]. Unfortunately, the information given to me by Hall and Ninemire did not bear that possibility out. It was clear after my trip to Kansas City that it was through Ron Hall's actions of requesting a map from the FBI and from his conversations with the FBI agents and assistant U.S. attorney in the hallway outside the courtroom that the authorities knew of the existence of the map drawn by [Henderson].

As discussed *supra,* this affidavit is entitled to the AEDPA presumption of correctness. Pursuant to this presumption, Ms. Icenhauer-Ramirez *did* investigate the possibility that law enforcement learned of a map's existence by eavesdropping on the "red room" and concluded to the contrary. Counsel is not ineffective for failing to pursue a claim that is unsupported by law or evidence. *See, e.g.,* ***Hernandez v. Johnson,*** 108 F.3d 554, 564 (5th Cir.), *cert.*

denied, 522 U.S. 984 (1997). In short, jurists of reason would *not* debate the district court's conclusion that, in this regard, Ms. Icenhauer-Ramirez's representation was *not* deficient. ***Henderson II,*** slip op. at 23.

2.

Henderson next asserts reasonable jurists would debate whether her trial attorneys were ineffective for failing to investigate, and challenge, Henderson's communications with Jackson, a fellow inmate at the Travis County Jail, whom Henderson claimed was an agent of the State. As discussed, Jackson was assigned to "firewatch" duty, through which one inmate monitors another; while monitoring Henderson, Jackson exchanged correspondence with, and spoke to, her; and Jackson provided to law enforcement, *inter alia,* letters written by Henderson, which gave conflicting accounts of the child's location.

a.

This information was critical evidence at the motion to suppress hearing. The defense strategy was to show: when it sought production of the maps, law enforcement was both subjectively and objectively aware that the child was dead; and if this were so, the crime-fraud exception to the attorney-client privilege would not apply because there was no ongoing criminal offense. *See* TEX. R. EVID. 503(d)(1). Obviously, any evidence suggesting the child may have still been alive would be detrimental to this strategy.

Ms. Icenhauer-Ramirez objected immediately to the firewatch correspondence, contending that Jackson was acting as an agent for the State; and her requested recess

was granted. Upon resumption of the hearing, she informed the court she was unable to proceed without further investigation into Jackson's communications (of which she had learned only the previous day, during a detective's pre-trial hearing testimony), and the circumstances under which they were made. The court recessed hearing this issue for approximately one month.

In her state habeas affidavit, Ms. Icenhauer-Ramirez stated: she then contacted Jackson, who told Ms. Icenhauer-Ramirez she was *not* acting as an agent for law enforcement at the time she communicated with Henderson. After meeting with Jackson, Henderson's counsel moved to suppress all statements Henderson made to Jackson. (Counsel later abandoned the motion because Elvira Eller failed to provide tapes, discussed *infra,* which allegedly contained statements by Sheriff Keel demonstrating that he knew the child was dead.)

The record belies the claim that Ms. Icenhauer-Ramirez failed to adequately investigate the "firewatch" communications. Therefore, jurists of reason would *not* debate the district court's ruling that "[t]he state habeas court thus did not apply ***Strickland*** unreasonably when [it] concluded Icenhauer-Ramirez had provided effective assistance". ***Henderson II***, slip. op. at 24.

b.

To the extent Henderson claims the "firewatch" communications *per se* violated her Sixth Amendment right to counsel, the district court held: because, when the communications occurred, Henderson had not yet been charged with capital child murder, such rights had not then attached for that offense. *See* ***Texas v. Cobb***, 532

U.S. 162, 168 (2001) (holding the Sixth Amendment right to counsel attaches only after being formally charged with a specific offense). Nevertheless, the district court granted Henderson a COA for this claim, noting the "harsh" nature of the ***Cobb*** rule and expressing concern that, because, when the communications occurred, Henderson had already been "charged with kidnap[p]ing the same child she was eventually charged with murdering, there seems significant danger of gamesmanship by authorities". *See* ***Henderson III***, slip op. at 5. Therefore, we need *not* consider this subissue for COA purposes.

c.

In regard to Henderson's claim that a COA should issue because Linda Icenhauer-Ramirez was ineffective for abandoning the motion to suppress, a lawyer cannot be ineffective for failing to pursue futile motions. *See, e.g.,* ***Koch v. Puckett***, 907 F.2d 524, 527 (5th Cir. 1990). Jurists of reason would *not* debate the district court's conclusion that the state habeas court concluded correctly that this issue would *not* be resolved in Henderson's favor.

3.

Henderson asserts that a COA should issue because her trial counsel failed to obtain a ruling on Henderson's pre-trial motion to suppress any maps created by Henderson. Identifying the specific claim Henderson raises requires detailing the progression of this claim on federal habeas. In her petition, Henderson claimed that the Icenhauer-Ramirezes, in their motion to suppress, failed to use an "*ex parte* deposition" (presumably of AFPD Hall and/or investigator Ninemire) that would demonstrate

that, but for the actions of Hall, Ninemire, and Byington, "law enforcement authorities would never have learned of the existence of a map indicating the location of the child's body". In ruling, the district court stated it did not believe Henderson was prejudiced by the Icenhauer-Ramirezes' failure to use the deposition, concluding "it is unlikely the deposition testimony would have changed the result". ***Henderson II,*** slip op. at 22.

In her COA request in district court, in challenging her representation at the suppression motion, Henderson took a different approach. She contested Linda Icenhauer-Ramirez's contention that she could fully litigate the suppression issue at trial; Henderson asserted that the suppression "motion was never ruled on, and the State's collateral estoppel motion precluding relitigation was granted by the trial court". Improperly seeking to incorporate other materials, Henderson accused trial counsel of "arbitrarily unreasonably [choosing] to disbelieve evidence which could have helped their client". The district court appears *not* to have addressed this claim, which was presented out of order and in a nonsensical fashion. Instead, with regard to Henderson's trial counsel, the district court granted a COA concerning *only* Ms. Icenhauer-Ramirez for her "ineffective assistance . . . regarding the map only". ***Henderson III,*** slip op. at 5. It denied a COA for the IAC claim concerning Linda and Robert Icenhauer-Ramirez's representation at trial.

In our court, Henderson's COA application challenged Linda Icenhauer-Ramirez's failure to obtain a ruling on her suppression motion. In stating that "the suppression motion only challenged the actions of the Missouri attorney [AFPD Hall] and did not address the action or inaction of any counsel at the map hearing", Henderson appears to

conflate the pre-trial suppression motion with the earlier map hearing. We are puzzled, to say the least, by Henderson's assertion that Ms. Icenhauer-Ramirez failed to obtain a ruling on her suppression motion; *it was denied during pre-trial hearings.*

In the light of the progression of this claim through federal habeas, we conclude that the specific claim presented to our court – which reveals a lack of understanding of the pre-trial motions in this case – *was not raised until Henderson's COA request to the district court.* Because it was *not* timely raised, we will *not* consider it.

In the alternative, we conclude that reasonable jurists would *not* disagree with the district court's conclusion that Ms. Icenhauer-Ramirez's representation was *not,* in this regard, unreasonable; had the suppression motion been conducted differently, the motion's result would likely have been the same.

4.

Henderson next contends a COA should issue for whether her trial attorneys were ineffective for providing to the prosecution information provided by Elvira Eller, who had a personal relationship with Sheriff Keel during the pre-trial period of Henderson's proceedings. Eller contacted Henderson's attorneys, informed them of that relationship, and claimed she possessed tapes proving the Sheriff knew the child was dead when the State was seeking production of the maps. Eller, however, never produced any tapes supporting that claim. Ms. Icenhauer-Ramirez eventually notified the prosecution about Eller and disclosed the communications and tapes Eller had provided to defense counsel.

Henderson contends Ms. Icenhauer-Ramirez was ineffective in doing so, because her actions resulted in no advantage to Henderson and only helped the prosecution by putting it on notice that Sheriff Keel might present character issues harmful to the State's case. In a 1998 deposition with Henderson's appellate counsel, Ms. Icenhauer-Ramirez stated she felt that, if a tape did exist, it was critical, material evidence and "we felt like we had an obligation to inform the DA's office of that".

Henderson offers nothing, other than conclusory statements, in support of her claim that Ms. Icenhauer-Ramirez's providing this information to the prosecution was unreasonable. Ms. Icenhauer-Ramirez's state habeas affidavit stated:

> None of the [audio] tapes which Ms. Eller delivered to us had anything to do with the Cathy Henderson case. They contain[ed] [communications detailing the personal relationship] between Ms. Eller and [Sheriff] Keel. Although Ms. Eller asserted to us back in 1995, that she had a recording of [Sheriff] Keel saying that he knew Brandon Baugh was dead during the time [Sheriff] Keel was hounding Nona Byington, despite exhaustive attempts on our part, Ms. Eller never produced such a tape recording.

As discussed *supra,* this affidavit is entitled to the AEDPA presumption of correctness. None of the materials provided to the prosecution had any bearing on Henderson's case, and "exhaustive attempts" were made to procure the allegedly taped conversation in which Sheriff Keel allegedly stated he knew the child was dead. Therefore, reasonable jurists would *not* disagree with the district

court's conclusion that, in this regard, Ms. Icenhauer-Ramirez's representation was *not* deficient.

5.

In her final IAC COA request, Henderson contends that a COA should issue for whether Linda Icenhauer-Ramirez was ineffective for failing to object to the following jury instruction: "A person is criminally responsible if the result would not have occurred but for her conduct". *See* TEX. PENAL CODE ANN. § 6.04 (Vernon 1994). Henderson maintains that, for capital murder, the defendant must intend the *result* as opposed to the *conduct. See* ***Medina v. State,*** 7 S.W.3d 633, 639 (Tex. Crim. App. 1999), *cert. denied,* 529 U.S. 1102 (2000).

The jury was also instructed, however, that it was required to find "beyond a reasonable doubt that ... Henderson ... *knowingly or intentionally* cause[d] the death of an individual ... under six years of age...." (Emphasis added.) This language closely tracks the Texas murder statute. *See* TEX. PENAL CODE ANN. § 19.02(b)(1) (Vernon 1994) (stating that an offense is committed by "intentionally or knowingly caus[ing] the death of an individual"). Because this instruction was proper, reasonable jurists would *not* disagree with the district court's conclusion that: any objection by Ms. Icenhauer-Ramirez would have been futile; therefore, her not objecting was reasonable; and, in this regard, her performance was not deficient. *See, e.g.,* ***Clark v. Collins,*** 19 F.3d 959, 966 (5th Cir.), *cert. denied,* 512 U.S. 1284 (1994).

In sum, the district court's rulings on the reasonableness of trial counsel's challenged conduct are *not* debatable among jurists of reason on whether they constituted

deficient performance (first prong). Accordingly, for COA purposes, it is unnecessary to consider whether jurists of reason would debate whether any of the actions by trial counsel prejudiced Henderson (second prong). *See* ***Strickland,*** 466 U.S. at 687 ("Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.").

D.

Henderson's final COA request concerns whether her Sixth Amendment confrontation and Fourteenth Amendment due process rights were violated by the trial court's post-trial findings of fact and conclusions of law concerning her pre-trial motion to suppress, which was denied before trial. Henderson characterizes these findings and conclusions as "*ex parte*".

1.

The district court declined to address Henderson's Sixth Amendment confrontation claim for this issue because it was inadequately briefed. *See* ***Henderson II,*** slip op. at 30 n.13. We agree with that conclusion and, therefore, will not address this claim. *See, e.g.,* ***Trevino v. Johnson,*** 168 F.3d 173, 181 n.3 (5th Cir.) (stating that inadequately argued claims in a habeas petition are deemed waived), *cert. denied,* 527 U.S. 1056 (1999).

2.

Concerning Henderson's COA request for a claimed violation of her due process rights, she contends the trial

court erred by issuing findings and conclusions drafted post-trial by the prosecution and denied her due process by not allowing her to relitigate issues from the map suppression hearing at trial.

Generic due process violations exist only where the trial court commits an error that renders the proceeding fundamentally unfair. ***Styron v. Johnson***, 262 F.3d 438, 454 (5th Cir. 2001). An error makes a proceeding "fundamentally unfair [where] there is a reasonable probability that the verdict might have been different had the trial been properly conducted". ***Id.*** (quoting ***Rogers v. Lynaugh***, 848 F.2d 606, 609 (5th Cir. 1988)).

a.

Henderson notes the findings and conclusions were entered over 40 days *after* she was sentenced, as well as after the court denied her new-trial motion. Henderson was found guilty and sentenced in May 1995; the findings and conclusions were filed that July. The motion to suppress upon which these findings and conclusions were based, however, was denied during Henderson's pre-trial hearings. Henderson claims this demonstrates the findings and conclusions were drafted to assist Sheriff Keel in his then-pending civil action with Nona Byington, yet she fails to provide any citation to the record to support this arguably off-the-wall assertion. (As noted, Byington's defamation action against Sheriff Keel was settled.) No reliable evidence has been presented, however, to suggest the findings and conclusions were delayed for an improper purpose.

In his state habeas affidavit, prosecutor Robert Smith stated that he provided the proposed findings and conclusions only as suggestions. Moreover, he denied they were drafted in order to aid anyone in an unrelated civil suit. As discussed *supra,* this affidavit was found "true" by the state habeas court and is presumed correct under AEDPA. As also discussed *supra,* Henderson fails to even discuss this affidavit, much less offer the requisite clear and convincing evidence to rebut this presumption. In the light of Smith's affidavit, Henderson fails to show jurists of reason would disagree with the district court that "it is hard to see how the judge's admittedly late entry of the findings of fact and conclusions of law impacted the outcome of her case or even his decision of how to rule on that particular motion to suppress". ***Henderson II,*** slip. op. at 31.

b.

Finally, Henderson claims her due process rights were denied when, at trial, she was not allowed to relitigate issues from the map suppression hearing. She asserts that the "State's motion precluding relitigation of those issues at trial was granted for the first time in an *ex parte* set of findings, entered after trial, that were never served on trial counsel". Needless to say, this is yet another puzzling claim; again, Henderson's suppression motion was denied during her pre-trial hearings. We need *not* address this claim because Henderson did not adequately address it in her COA request to the district court.

III.

For the foregoing reasons, a COA is ***DENIED*** for each of Henderson's four COA requests. A subsequent opinion will address the claims for which the district court granted a COA.

COA DENIED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS AUSTIN DIVISION

CATHY LYNN HENDERSON,

Petitioner,

-vs-

DOUG DRETKE,[1]

Respondent.

Case No. A-02-CA-758-SS

ORDER

(Filed Mar. 31, 2004)

BE IT REMEMBERED on the 31st day of March 2004 the Court reviewed the file in the above-styled cause, and specifically Petitioner Cathy Lynn Henderson's Preliminary Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 [#6], Petitioner's Amended/Supplemental Applications for Writ of Habeas Corpus [#7, #10], Respondent's Answer and Motion for Summary Judgment with Brief in Support [#12] and Petitioner's response thereto [#19]. Having considered the petitions, motion and response, the case file as a whole, the state court records, and the applicable law, the Court enters the following opinion and orders.

[1] Doug Dretke has been automatically substituted for the previous named respondent, Janie Cockrell, under Rule 25(d)(1) of the Federal Rules of Civil Procedure, as he succeeded Cockrell as Director of the Texas Department of Criminal Justice, Correctional Institutions Division on August 18, 2003.

Procedural Background

The Petitioner, Cathy Lynn Henderson, was charged by indictment on April 22, 1994 with the murder of an individual under six years of age, which is a capital offense under Texas law, in Cause Number 94-2034 in the 299th District Court of Travis County, Texas. Tr. at 4;[2] TEX. PENAL CODE § 19.03(a)(8). The indictment charged Henderson with killing Brandon Baugh, an infant child, by striking his head against a blunt object unknown to the Grand Jury in a manner unknown to the Grand Jury. Tr. at 4. Henderson pleaded not guilty to the indictment and the case proceeded to trial before Judge Jon N. Wisser on April 25, 1995. *Id.* at 749. The jury found Henderson guilty of capital murder. *Id.* Henderson's attorneys at trial were Linda Icenhauer-Ramirez and Brenda Rhea.[3] *Id.* at 749.

On May 19, 1995, the punishment portion of the trial began. The jury found beyond a reasonable doubt (1) a

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[2] "Tr." refers to the transcript of pleadings and documents filed with the clerk during the state court murder trial, followed by page number. These documents are located in the second of the 13 volumes of state records provided to this Court. "SR" refers to the transcription of the state court murder trial and punishment proceedings, proceeded by volume number and followed by page number. "SX" refers to the State's trial exhibits, preceded by volume number and followed by exhibit number. "SuppSHTr" refers to the supplemental transtript of state habeas pleadings and documents, located in the first of the 13 volumes of state records provided to this Court. "SuppSHTr (Reply)" is the supplemental state habeas transcript that includes the State's reply, also located in the first volume of records. This citation is often followed by an "at SX-PC," which references the exhibits attached to the State's reply. "Pet. Ex." refers to the exhibits submitted by Henderson to this Court with her amended federal application.

[3] Brenda Rhea replaced Robert Icenhauer-Ramirez, who was originally appointed as co-counsel but withdrew. *See* SuppSHTr (Reply) SX-PC 1 at 43-44.

probability that Henderson would commit future criminal acts of violence that would constitute a continuing threat to society, and (2) there were no sufficient mitigating circumstances to justify a sentence of life imprisonment rather than death. Tr. at 750. Accordingly, on May 30, 1995, Judge Wisser entered a judgment sentencing Henderson to death. *Id.* at 750-52.

On automatic direct appeal, Henderson was represented by Keith Hampton and the Court of Criminal Appeals affirmed the trial court's judgment on December 3, 1997. *Henderson v. State*, 962 S.W.2d 544 (Tex. Crim. App. 1997). The United States Supreme Court denied certiorari review. *Henderson v. Texas*, 525 U.S. 1978 (1998). Henderson subsequently filed a state habeas petition that Judge Wisser, after entering findings of fact and conclusions of law, recommended be denied. *Ex Parte Henderson*, No. 94-2034 (299th Dist. Ct., Travis County, Tex. Aug. 10, 2001) (unpublished).[4] The Court of Criminal Appeals adopted the trial court's findings of fact and conclusions of law on March 6, 2002. *Ex parte Henderson*, Appl. No. 49,984-01 (Tex. Crim. App. Mar. 6, 2002) (*per curiam*) (unpublished).[5] Henderson filed the instant federal writ on February 14, 2003 and an amended and supplemental writs on March 17 and 24, 2003. Respondent filed a 132-page response and motion for summary judgment on April 10, 2003. After receiving extensions of time,

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[4] Hereinafter, the Court will short-cite the unpublished state habeas trial court opinion as *Ex Parte Henderson*, No. 94-2034, at [page number].

[5] Hereinafter, the Court will short-cite the unpublished Texas Court of Criminal Appeals habeas opinion as *Ex Parte Henderson*, Appl. No. 49,984-01, at [page number].

Henderson filed a response to Respondent's motion for summary judgment on June 16, 2003.

Statement of Facts

This case involves the January 21, 1994 murder of three-and-one-half-month-old Brandon Baugh. The Texas Court of Criminal Appeals set forth the following account of the facts, to which this Court must defer[6]:

> On the morning of January 21, 1994, Eryn and Melissa Baugh left their infant son, Brandon, with their babysitter, [Henderson]. That day, both [Henderson] and Brandon disappeared. A kidnapping investigation began the next day. [Henderson] was profiled on the television show "America's Most Wanted," and Texas law enforcement authorities and the FBI received tips indicating that [Henderson] had been seen with the baby in Missouri and Idaho. In addition, law enforcement obtained information from [Henderson's daughter that the trunk of [Henderson]'s car had been slightly ajar during a trip on the 21st to Holland, Texas and that [Henderson] had carried a diaper bag in her car.
>
> On February 1, [Henderson] was arrested by the FBI in Kansas City, Missouri. FBI agent Michael Napier interrogated [Henderson], while FBI agent Timothy Hepperman observed from behind a one-way mirror. [Henderson] first denied any knowledge of Brandon's location or well-being. Later, she stated that the baby's grandmother, driving a car with Oklahoma license

[6] *See, infra*, Analysis, Section II.

plates, picked up Brandon during the afternoon of January 21. [Henderson] later admitted to killing Brandon but claimed that his death was an accident. She told Agent Napier that she had buried the baby in a wooded area near Waco, that she had used a spade to dig the grave and had left the spade lying nearby, and that she could take an officer to the scene. Napier memorialized [Henderson]'s final story in writing, but she refused to sign the written statement. Agent Napier then turned to the subject of drawing a map, and asked [Henderson] a number of times if she would draw a map of the baby's location. She repeatedly declined to do so and subsequently requested an attorney. The interrogation was then terminated. At the conclusion of the interview, Agents Napier and Hepperman both formed the subjective belief that the baby was dead. On February 2, 1994, Agent Hepperman communicated to Travis County deputies Stan Hibbs and Rick Wines that he believed the baby was dead and also that [Henderson] had declined requests to draw a map.

That same day, Ronald Hall, assistant federal public defender in Kansas City, and Ronald Ninemire, chief investigator for the public defender's office, met with [Henderson]. During the course of conversations with [Henderson], Hall determined that he needed a map. He contacted Agent Hepperman and inquired about obtaining a Texas map. Not knowing who Hall was, Hepperman was uncooperative. In response, Hall told Hepperman that he was trying to locate the baby. Frustrated in his attempts to obtain a map in the federal courthouse, Hall walked across the street to his office and obtained a Texas map from Ninemire's desk. Later, Hepperman

arranged delivery of a Texas map to Hall and apologized for the earlier encounter.

After interviewing [Henderson], Hall talked to a group of law enforcement agents, including Carla Oppenheimer (the assistant U.S. Attorney handling the case), Agent Hepperman, and Deputies Hibbs and Wines. Hall told this group that he believed the baby was dead and buried in a wooded area outside Waco. Several of the law enforcement agents testified that Hall also stated that [Henderson] had drawn a detailed map to the location of the baby and that he (Hall) had never been to Texas but could find the baby with the map. Hall denied making these statements regarding the map and denied that he ever volunteered that [Henderson] had made a map. Instead, Hall testified that he was asked about a map and that he simply stated that all materials were being forwarded to [Henderson]'s attorneys in Texas. The testimony is uncontroverted, however, that Hibbs asked both Hall and Ninemire for copies of the map, and both declined such requests. [Hibbs admitted that he asked Hall if he could accidently leave a copy of the map on the fax machine.] Hepperman and Oppenheimer nevertheless formed subjective beliefs that the map was made with an intent to be turned over to law enforcement. Hepperman based his belief on statements made by Hall to him in attempting to obtain a Texas map while Oppenheimer based her belief on statements made by [Henderson] during the FBI interrogation.

That day, law enforcement authorities asked Nona Byington, [Henderson]'s Texas lawyer, for the map, and she attempted to negotiate a plea bargain in which she would exchange the maps in her possession for an agreed sentence. On

February 3, a Travis County grand jury issued a subpoena duces tecum for Byington to appear and produce any maps in her possession that were created by [Henderson]. Byington did not appear before the grand jury. Travis County Sheriff Terry Keel subsequently obtained an arrest warrant for Byington and a search warrant for her car and office. On February 4, the arrest warrant was withdrawn but the search warrant for Byington's office and car was executed. No maps were found in the search. During this period of time, Byington was herself represented by attorneys who claimed that the maps were covered by the attorney-client privilege. In addition, [Henderson] herself signed an affidavit stating that all communications or materials conveyed by her to her attorneys during the course of representation were privileged and not to be disclosed.

Meanwhile, on February 2, [Henderson] had bean transferred from Missouri to Texas custody. While confined in Texas, [Henderson] made various statements concerning Brandon's whereabouts. At one point, she denied any knowledge of the child's location and stated that he had gone with his grandmother. At another point, [Henderson] stated that she could draw a map to a drop-off point in Missouri where the baby had been taken to Oklahoma.

On February 7, the grand jury issued another subpoena and the State filed a motion to compel production, in compliance with that subpoena, of any maps drawn by [Henderson] in Byington's possession. A hearing was held before Judge Jon Wisser in which the State contended that (1) the maps were not confidential communications covered by the attorney-client privilege,

and (2) the maps fell within the crime-fraud exception to the privilege. Judge Wisser granted the motion to compel. He found that, although an attorney-client relationship between Byington and [Henderson] existed, the maps were not privileged because they were made with the intent to be turned over to law enforcement authorities. Judge Wisser explained that, in arriving at this conclusion, he consulted "one of my much more learned brethren of the law school," whom the parties later learned was Professor Guy Wellborn, an expert on the rules of evidence.

As a result of Judge Wisser's ruling, copies of two maps were turned over pursuant to the grand jury subpoena. According to Hibbs, the maps in fact indicated a grave site. Using the maps, law enforcement authorities found the baby's grave site and recovered his body.

[Henderson] subsequently filed a motion to recuse Judge Wisser from presiding over the remainder of the proceedings in the case. This recusal motion alleged that Judge Wisser's previous consultation with Professor Wellborn violated the Code of Judicial Conduct and that Judge Wisser's further participation in the trial would compromise his ability to be impartial because he would be required to rule upon the propriety of that consultation. A different judge was assigned to hear the motion, testimony was heard, and the motion to recuse was overruled.

[Henderson] subsequently filed a motion to suppress "material revealed and recovered as a result of" the compelled release of the maps. After a hearing, Judge Wisser made numerous findings of fact and conclusions of law. A summary of

> his relevant conclusions are as follows [footnote omitted]: (1) [Henderson] was precluded from litigating the privilege issue at the motion to suppress because she failed to meet her burden at the motion to compel hearing when she had an opportunity to litigate the issue, (2) even considering the evidence at the motion to suppress hearing, the maps were not privileged because they were intended to aid law enforcement officers in locating the missing child and were not intended to be confidential, (3) the public defender did not violate the attorney-client privilege during the course of his discussions with law enforcement authorities, (4) the crime-fraud exception to the attorney-client privilege applied because there was evidence and information of an ongoing kidnapping at the time of the hearing on the motion to compel, (5) even if law enforcement authorities were bound by [Henderson]'s statements that the child was dead, the crime-fraud exception to the attorney-client privilege applied because [Henderson] would be committing the ongoing crime of abuse of a corpse, (6) even if the maps were privileged communications not subject to exception, neither the "fruit of the poisonous tree doctrine" nor Article 38.23 required suppression of evidence recovered as a result of the production of the maps, and (7) [Henderson] was not deprived of effective assistance of counsel.

Henderson, 962 S.W.2d at 548-50.

Analysis

I. Grounds for Relief

In her petitions, Henderson contends she is entitled to federal habeas relief for the following reasons:

1. Henderson's Sixth Amendment rights were violated when state law enforcement officials engaged in tactics that compromised the confidentiality of Henderson's communications with her lawyer;

2. Henderson's Sixth Amendment right to effective assistance of counsel was violated because Federal Public Defender Ron Hall revealed a privileged communication to law enforcement officials – that Henderson had drawn a map indicating the location of the victim's body;

3. Henderson's Sixth Amendment right to effective assistance of counsel was violated because Nona Byington, a Texas attorney who had represented Henderson before and whose counsel Henderson sought upon her return to Travis County, also informed law enforcement officials Henderson had drawn a map of where the victim was buried;

4. Henderson's Sixth Amendment right to effective assistance of counsel was violated because Steve Brittain, Nona Byington's attorney who represented Byington at the hearing on the motion to compel the map, did not adequately safeguard Henderson's rights when he attempted to plea bargain on behalf of Henderson;

5. Henderson's Sixth Amendment right to effective assistance of counsel was violated because her appointed trial attorney, Linda Icenhauer-Ramirez, did not adequately assist her on the matter of the map and because and Linda and Robert Icenhauer Ramirez, appointed co-counsel, did not provide constitutionally adequate assistance at her trial;

6. Henderson's Sixth Amendment right to effective assistance of counsel was violated because she received constitutionally inadequate assistance from her appellate counsel, Keith Hampton;

7. Henderson's Fourteenth Amendment due process rights and Sixth Amendment confrontation rights were violated when the trail court rendered findings of fact and conclusions of law on her motion to suppress *ex parte*;

8. Henderson's Fourteenth Amendment due process rights and Sixth Amendment confrontation rights were violated when the trail court denied Henderson the right to be present at the hearing on the motion to compel the map's production;

9. Henderson's Sixth Amendment right to effective assistance of counsel was violated under the rule announced in *Massiah v. United States*, 377 U.S. 201 (1964), when the police placed her under fire watch in order to obtain incriminating statements from her;

10. Henderson's Fourteenth Amendment due process rights were violated under the rule announced in *Brady v. Maryland*, 373 U.S. 83 (1963), when the prosecution failed to turn over exculpatory evidence;

11. Henderson's Fourteenth Amendment due process rights were violated when the trial court judge consulted with an outside wiped in ruling on the motion to compel the map (thereby receiving evidence outside the courtroom) and subsequently failed to recuse himself;

12. Henderson's constitutional rights were violated because she was convicted under the Texas child capital murder statute, TEX. PENAL CODE § 19.03(a)(8), which on its face violates the Equal Protection Clause of the Fourteenth Amendment and the Cruel and Unusual Punishment Clause of the Eighth Amendment; and

13. Henderson's Fifth and Fourteenth Amendment rights were violated because her statement to FBI Agent Napier in Missouri was involuntary and coerced.

Respondent contends Henderson has procedurally defaulted and is thus barred from asserting her first and eleventh grounds for relief. Additionally, Respondent contends several of Henderson's claims (first through eighth and twelfth) are barred by the rule announced in *Teague v. Lane*, 489 U.S. 288 (1989), that habeas relief can only be based upon constitutional rights already established by precedent at the time of the petitioner's conviction or subsequently-established rights that have retroactive application. Congress effectively codified the *Teague* rule

when it enacted the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which is discussed more fully in the next section. *See* 28 U.S.C. § 2254(d)(1) (stating habeas relief can only be granted when the state court determination was "contrary to, or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States").

II. Standard for Review under AEDPA

Under the AEDPA, a federal court may grant a state prisoner's federal habeas petition as to any claim addressed by the state courts on the merits only if the state court's decision was (1) "contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States," or was (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *see also Brown v. Cain*, 104 F.3d 744, 749 (5th Cir. 1997), *cert. denied*, 520 U.S. 1195 (1997). The state court's application of clearly established federal law must be "unreasonable," not merely erroneous or incorrect. *See Williams v. Taylor*, 529 U.S. 420 (2000).

With respect to fact findings made by state courts, this Court shall presume the state court's determination of a factual issue is correct unless the petitioner rebuts the presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). Where the petitioner has failed to develop the factual basis of a claim instate court, the petitioner may not present additional factual evidence on that issue unless his claim falls within the narrow exceptions of 28 U.S.C. § 2254(e)(2):

(A) the claim relies on –

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable;

(ii) actual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

See, e.g., Hernandez v. Johnson, 108 F.3d 554 (5th Cir. 1997) *cert. denied*, 522 U.S. 984 (1997).

III. Summary Judgment Standard

Summary judgment may be granted if the moving party shows there is no genuine issue of material fact and it is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(c). In deciding summary judgment, the Court construes all facts and inferences in the light most favorable to the nonmoving party[7] – here, the petitioner. *Hart v. O'Brien*, 127 F.3d 424, 435 (5th Cir. 1997), *cert. denied*, 525 U.S. 1103 (1999). The standard for determining whether to grant summary judgment "is not merely whether there is a sufficient factual dispute to 'permit the case to go forward, but whether a rational trier of fact could find for the

[7] But as the Court discussed, *supra*, this Court must afford AEDPA deference in the manner described in Section II to any state court factual findings.

nonmoving party based upon the record evidence before the court." *James v. Sadler*, 909 F.2d 834, 837 (5th Cir. 1990).

Both parties bear burdens of producing evidence in the summary judgment process. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). First, "[t]he moving party must show that, if the evidentiary material of record were reduced to admissible evidence in court, it would be insufficient to permit the nonmoving party to carry its burden of proof." *Hart*, 127 F.3d at 435. The nonmoving party must then "set forth specific facts showing a genuine issue for trial and may not rest upon the mere allegations or denials of its pleadings." *Id.* However, "[n]either 'conclusory allegations' nor 'unsubstantiated assertions' will satisfy the non-movant's burden." *Wallace v. Texas Tech Univ.*, 80 F.3d 1042, 1047 (5th Cir. 1996).

IV. Sixth Amendment Violations by State Authorities

Henderson's first claim is state law enforcement officials unconstitutionally interfered with her Sixth Amendment right to assistance of counsel by repeatedly claiming Brandon, in spite of the conflicting information they received from FBI investigators, was in fact dead in an effort to get around the attorney client privilege that protected Henderson's Map from discovery by the police and that the officials were ultimately successful because the trial judge ordered Henderson's attorney to produce the map, an order which itself violated the Sixth Amendment. Respondent contends this claim is unexhausted, procedurally barred, and in any event, without merit.

A. Procedural Bar

To file an application for writ of habeas corpus under 28 U.S.C. § 2254, a petitioner must first exhaust all available remedies in the state court. *See* 28 U.S.C. § 2254(b). If a petitioner has not exhausted his state remedies as to any of his federal claims, the Court must dismiss the habeas petition. *See Castille v. Peoples*, 489 U.S. 346, 349 (1989). This requirement ensures that state courts have an opportunity to correct constitutional errors before the petitioner turns to the federal courts for relief. *See Picard v. Connor*, 404 U.S. 270, 275-76 (1971) ("[W]e have required a state prisoner to present the state courts with the same claim he urges upon the federal courts."); *Rose v. Lundy*, 455 U.S. 509, 518 (1982) ("The exhaustion doctrine is principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings."). The exhaustion requirement is satisfied once each claim raised in a federal habeas petition has been presented to the Texas Court of Criminal Appeals through direct appeal or collateral attack. *See Castille*, 489 U.S. at 351; *Richardson v. Procunier*, 762 F.2d 429, 431 (5th Cir. 1985).

Henderson contends she has exhausted this claim because she alleged in her state habeas application that Travis County authorities knew Brandon was dead and yet nevertheless argued to the state court the map was necessary in order to save the infant's life in order to procure warrants and subpoenas to obtain the map. In her responsive pleading, she outlines the allegations she asserted in her state application in detail. *See* Responsive Pldg. at 6-7. The Court has reviewed the application filed by Henderson in state court, and while she is correct that she set forth allegations regarding the misconduct of law

enforcement officials and the trial judge's error in compelling Byington to produce the map, she never alleged the law enforcement conduct or the judge's ruling itself constituted a violation of the Sixth Amendment. Instead, she alleged the manner in which the attorneys who were representing and counseling her handled the map situation violated her constitutional right to effective assistance of counsel and challenged the correctness of the judge's order compelling the map's production under the Fourteenth Amendment. *See Ex Parte Henderson*, Appl. No. 49,984-01, First Amended Original Application for Post-Conviction Writ of Habeas Corpus at 70-76 (Hall's ineffectiveness); 77-81 (Byington's ineffectiveness); 81-83 (Brittain's ineffectiveness); 84-115 (Icenhauer-Ramirez's ineffectiveness for, among other things, for failing to appear at map hearing); 138-51 (correctness of judge's ruling). As such, the state court was never afforded the opportunity to rule upon whether the state authorities' conduct or the trial judge's order compelling production of the map violated Henderson's Sixth Amendment rights, and these claims were therefore not exhausted. *Cf. Baldwin v. Reese*, 124 S. Ct. 1347, 1351-52 (2004) (holding a petitioner had not "fairly presented" a federal ineffective assistance of counsel claim to the state courts when he had not explicitly used the words "ineffective assistance of appellate counsel" or referred to the federal constitution or any other case law that would have alerted the state court of the federal nature of his claim).

In this case, the Court will not dismiss Henderson's habeas petition without prejudice for failure to exhaust this claim because the Texas courts would deny any future state petition filed by Henderson on grounds the state officials' conduct or trial court ruling violated her Sixth

Amendment rights as an abuse of the writ. TEX. CODE CRIM. PRO. ANN. art. 11.07, § 4. This Court could not review a petition the state court denied as an abuse of the writ, because when a state court decision rests on a state procedural ground independent of a federal claim and adequate to support the judgment, federal courts lack jurisdiction to review the merits of the case. *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). When a petitioner has not exhausted his state court remedies and the state court in which he would have to exhaust would find his petition procedurally barred, there is a procedural default for purposes of federal habeas. *Coleman*, 501 U.S. at 735 n.1. When a petitioner has procedurally defaulted on her claims, she can still obtain federal habeas review if she can show cause and actual prejudice for the procedural default or that failure to address the merits of her federal claim will result in a miscarriage of justice. *Moore v. Roberts*, 83 F.3d 699, 702 (5th Cir. 1996), *cert. denied*, 519 U.S. 1093 (1997). To invoke the miscarriage of justice exception, a petitioner must show "factual innocence and not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623 (1998). Henderson has shown neither cause nor prejudice for failing to raise this claim in her state habeas application, and she does not allege she is actually innocent of capital murder. Therefore, this federal habeas claim is procedurally barred.

B. Sixth Amendment Arguments

But even if Henderson's first claim were not procedurally barred, she would still not be entitled to habeas relief. Henderson specifically contends Sheriff Keel and his subordinates were told by the FBI on February 2, 1994 that Henderson had made statements Brandon was dead

and the authorities had discovered a spade missing from Henderson's house, confirming her claim she had buried the body. Nevertheless, the sheriff through affidavit informed a judge that Byington was an accomplice to kidnapping and requested a warrant to search the lawyer's car and office and an arrest wa rant. The sheriff did not inform the judge the FBI believed Brandon dead. The judge issued the arrest and search warrants based on the partial information presented to him. Sheriff Keel also made statements to the press the Byington was an accomplice to kidnapping. Henderson contends the sheriff undertook these actions in an effort to dispute the legitimacy of the attorney client relationship between Byington and Henderson. Ultimately, a grand jury issued a subpoena and the trial judge entered an order compelling Byington to produce the map based on the law enforcement misrepresentation that the Brandon was still alive. Henderson argues these actions by state law enforcement officials and the trial judge's order compelling production of the map unconstitutionally interfered with her Sixth Amendment right to assistance of counsel.

The Sixth Amendment to the Constitution of the United States provides "[in] all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence." U.S. CONST. amend. VI. Henderson relies on the following passage from *Maine v. Moulton*, 474 U.S. 159 (1985), to support her contention that the law enforcement actions violated her Sixth Amendment right to assistance of counsel:

> The Sixth Amendment guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a "medium" between him and the State. As noted above, this guarantee

> includes the State's affirmative obligation not to act in a manner that circumvents the protections accorded the accused by invoking this right.

Moulton, 474 U.S. at 176. However, as the second clause of this passage acknowledges, the Sixth Amendment right to "rely on counsel as a 'medium'" attaches only after the initiation of formal charges. *Id.* The Supreme Court has repeatedly reemphasized the Sixth Amendment right to counsel attaches at the initiation of "adversary judicial proceedings," *Michigan v. Jackson*, 475 U.S. 625, 629-30 (1986), "'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" *Brewer v. Williams*, 430 U.S. 387 398 (1977) (quoting *Kirby v. Illinois*, 406 U.S. 682, 689 (1972)). Accordingly, Respondent contends Henderson's claim the sheriff and other law enforcement officials violated her Sixth Amendment right to counsel fails because the right had not attached at the time the trial court ordered Byington to produce the map, the last of the events between February 2, 1994 and February 8, 1994 about which Henderson complains. Respondent is correct – despite allegations of some very questionable conduct on the part of law enforcement investigating Henderson, that conduct cannot give rise to a Sixth Amendment violation because it took place before the state initiated formal charges against Henderson for capital murder.

The record reveals a Texas criminal complaint, probable cause affidavit, and warrant for kidnapping issued for Henderson on January 23, 1994. *See* 30 SR 215; SX 215. Henderson returned from Missouri to Texas on February 2, 1994. Tr. at 770. Byington was served with a subpoena duces tecum to produce the map by a Travis County grand jury on February 3, 1994. *Id.* The State filed a motion to

compel production of the map on February 7, 1994 and a hearing was held on the motion in the 299th District Court of Travis County. *Id.* The following day, the trial court ordered production of the map. *Id.* at 771-72. Only then, on February 9, 1994, did the state initiate formal adversarial proceedings against Henderson for capital murder, and specifically murder of a child under six years of age. *Id.* at 6-12.

In her responsive pleading, Henderson acknowledges she had not been formally charged with capital murder at the time the law enforcement committed the complained of conduct but points out she had been charged with kidnapping. The fact that Henderson's Sixth Amendment right had attached regarding the kidnapping charge does not save her habeas claim because the Supreme Court has held the Sixth Amendment right to counsel attaches only to the charged offenses and there is no exception for crimes that are "factually related" to a charged offense. *Texas v. Cobb*, 532 U.S. 167-68 (2001). The only time the Sixth Amendment right may attach to an uncharged offense is if that uncharged offense, although statutorily distinct from the charged offense, requires proof of the same facts that the charged offense requires. *Id.* at 173. Kidnapping requires proof that a person intentionally or knowingly abducted another person. TEX. PENAL CODE § 20.03. Under Texas law, there are several different circumstances where the commission of murder is defined as a capital offense. TEX. PENAL CODE § 19.03 (defining as a capital offense the murder of a peace officer; murder in the course of a kidnapping, burglary, robbery, sexual assault, arson, obstruction or retaliation; murder for remuneration; murder while escaping from a penal institution; murder while incarcerated on a murder offense;

murder of more than one person; and murder of a person under six years of age). It is clear from the February 9, 1994 complaint and the indictment eventually filed on April 22, 1994, that Henderson was charged with violating § 19.03(a)(8) of the Texas Penal Code, which makes it a capital offense to murder a child under six years of age. Tr. at 3-5; 10-12. Obviously the two crimes, kidnapping and murder of a child under six years of age, require proof of different facts and as such, Henderson's Sixth Amendment right to counsel did not attach on the capital murder charge until February 9, 1994. *Cobb*, 532 U.S. at 173.

Henderson in her responsive pleading acknowledges *Cobb* and its adverse implications for her argument, but nevertheless contends the Court should draw a distinction or create an exception in her case. Specifically, she argues it was only because of the State's clever drafting that the Sixth Amendment right to counsel did not attach since kidnapping can be a lesser included offense of capital murder as the Texas capital murder statute defines murder in the course of a kidnapping as a capital offense. TEX. PENAL CODE § 19.03(a)(2). The Supreme Court has explicitly acknowledged the danger a state could engage in gamesmanship by conducting its investigations with an eye toward which charges had been filed, but has also recognized the competing concern generated by the exclusion of evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached, which "would unnecessarily frustrate the public's interest in the investigation of criminal activities." *Moulton*, 474 U.S. at 180. In *Cobb*, the Supreme Court ultimately struck the balance in the manner described above, emphasizing that suspects are still protected by the Fifth Amendment right

to counsel that attaches during custodial interrogations, regardless of the offenses with which the suspect has been charged. *Cobb*, 532 U.S. at 171-172. Because a federal writ of habeas corpus can only be based on clearly established federal law, Henderson's novel interpretation and distinguishment of *Cobb* does not entitle her to relief. *See* 28 U.S.C. § 2254(d)(1); *see also Teague v. Lane*, 489 U.S. 288 (1989) (holding habeas relief can only be based upon constitutional rights already established by precedent at the time of the petitioner's conviction or subsequently-established rights that have retroactive application).

V. Ineffective Assistance of Counsel

A. Regarding the Map

Henderson next contends she is entitled to habeas relief because her Sixth Amendment rights were violated when she received ineffective assistance from Ron Hall, Nona Byington, Steve Brittain, and Linda Ichenhauer-Ramirez, each of whom played some role in representing her interest in protecting the confidentiality of the map. Specifically, Henderson alleges Hall and Byington both disclosed to law enforcement authorities she had drawn a map and Byington failed to recognize a conflict of interest arose when the police implicated her as an accomplice to Henderson's kidnapping, at which point she should have turned over the map to Ichenhauer-Ramirez. Henderson also claims Byington should have taken steps to ensure her rights were protected at the map hearing by ensuring Henderson's presence at the hearing. Additionally, Henderson alleges Brittain was ineffective because while representing Byington at the map hearing he failed to adequately safeguard Henderson's interests and attempted to plea bargain on her behalf. Finally, she maintains her

trial counsel, Icenhauer-Ramirez, was ineffective for failing to make sure Henderson was present at the map hearing and for failing to meaningfully participate in that hearing.

But as the Court explained in the context of the previous claim, Henderson's Sixth Amendment right to counsel on the capital murder charge did not attach until the State initiated formal adversarial proceedings against Henderson for capital murder on February 9, 1994. Hall's and Byington's alleged disclosure that Henderson had drawn a map occurred, if at all, sometime between Henderson's arrest and the February 7, 1994 motion to compel the map hearing. Likewise, Brittain's alleged ineffective assistance occurred, if at all, during the February 7, 1994 hearing, as did Icenhauer-Ramirez's failure to ensure Henderson's presence. Because the allegedly deficient performance of each of these attorneys took place, if at all, prior to the attachment of Henderson's Sixth Amendment right to counsel, she is not entitled to habeas relief on these claims.

B. Appointed Trial Counsel

Henderson asserts she is entitled to habeas relief because of the ineffective assistance she received from her appointed trial counsel, Linda Icenhauer-Ramirez, and appointed co-counsel, Robert Icenhauer-Ramirez. The state habeas trial court considered and rejected Henderson's arguments that Linda and Robert Icenhauer-Ramirez provided ineffective assistance at her trial. *Ex Parte Henderson,* No. 94-2034, at 3-5. The Texas Court of Criminal Appeals adopted the state habeas court's findings of fact and conclusions of law, Ex Parte Henderson,

Appl. No. 94984-01, and so they are entitled to AEDPA deference.

In the Fifth Circuit, a federal habeas court is required to defer to the state court's findings even where the state trial court held no hearing, made no factual findings, failed to state the legal basis of its decision, and simply used a form order to transmit the writ to the Court of Criminal Appeals. For instance in *Jackson v. Johnson*, 150 F.3d 520 (5th Cir. 1998), an ineffective assistance of counsel case in which the state habeas court held no evidentiary hearing and entered a summary order finding effective assistance solely on the basis the trial attorney's self-serving affidavit, the Fifth Circuit held because "the state court did rule against [the habeas petitioner] on the merits of his ineffective assistance of counsel claim . . . that ruling deserves the deference afforded state courts under the new AEDPA writ procedures." Since *Jackson,* the Circuit has reemphasized AEDPA "compels federal courts to review for reasonableness the state court's ultimate decision, not every jot of its reasoning." *Santellan v. Cockrell,* 271 F.3d 190, 193 (5th Cir. 2001); *see also Neal v. Puckett,* 286 F.3d 230, 246 (5th Cir. 2002) (en banc), *cert. denied, Neal v. Epps,* 537 U.S. 1104 (2003) (holding the Court is to review only the decision of the state court, not its reasoning, in determining whether it is contrary to or involved in a misapplication of clearly established federal law).

In this case, the state habeas trial court did make findings and the Court of Criminal Appeals indicated it adopted those findings. Accordingly, Henderson is only entitled to relief if she can show the state trial court's determination that she is not entitled to habeas relief is contrary to clearly established federal law. In the context

of claims for ineffective assistance of counsel, that means a federal court must presume, even if the state habeas court renders its decision without written opinion, the state court applied the well-known *Strickland* analysis. *Catalan v. Cockrell,* 315 F.3d 491, 493 (5th Cir. 2002). In this case, the state habeas trial court, although it never explicitly cited *Strickland,* did evaluate whether each attorney Henderson alleged rendered constitutionally ineffective assistance performed deficiently and whether the alleged deficient performance, if any, caused her prejudice. Therefore, the state court did apply the correct legal standard. *See Strickland v. Washington,* 466 U.S. 668, 686-692 (1984). Thus, the question the Court must answer is whether state habeas courts' application of *Strickland* is contrary to or involved a misapplication of clearly established federal law.

A state court decision is contrary to clearly established federal law if: (1) "the state court applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases," or (2) "the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [Supreme Court] precedent." *Williams v. Taylor,* 529 U.S. 362, 405-06 (2000). A state court decision is "an unreasonable application of clearly established" Supreme Court precedent if the state court "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case." *Id.* at 407-08. The inquiry into unreasonableness is objective. *Id.* at 409-10. A state court's incorrect application of clearly established Supreme Court precedent is not enough to warrant federal habeas relief; in addition, such an application must also be unreasonable. *Id.* at 410-12.

Under *Strickland,* to prove her attorneys' assistance ineffective, Henderson must show (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defense. *Strickland,* 466 U.S. at 686-692. To establish deficient performance, Henderson must show her attorney's representation "fell below an objective standard of reasonableness" judged in light of "the facts the particular case, viewed as of the time of counsel's conduct." *Id.* at 688, 690. The attorney's conduct is reviewed with great deference, and there is a strong presumption counsel has exercised reasonable professional judgment. *See Lockhart v. McCotter,* 782 F.2d 1275, 1279 (5th Cir. 1986), *cert. denied,* 479 U.S. 1030 (1987). To establish prejudice, Henderson must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Strickland,* 466 U.S. at 694. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Id.*

In this case, Henderson argues the following failures and actions by her trial attorneys constituted deficient performance and prejudiced the outcome of her case[8]: (1) Linda and Robert Icenhauer-Ramirez's failure to conduct the necessary investigation and to adequately prepare for and present the motion to suppress the evidence seized in violation of attorney-client privilege (the map); (2) Linda and Robert Icenhauer-Ramirez's failure to investigate and challenge communications between Henderson and other

[8] Henderson also contends Linda Icenhauer-Ramirez performed deficiently at the map hearing, but the Court already addressed and rejected this argument, *supra,* Sections IV.B-V.A, on the grounds Henderson's Sixth Amendment right to assistance of counsel had not yet attached.

Travis County Jail inmates and failure to obtain necessary process to investigate Henderson's statements to Bolivia Jackson, the inmate Henderson alleges was serving as an agent for the state; (3) Linda Icenhauer-Ramirez's failure to protect from the prosecution evidence she obtained from Ria Eller that Sheriff Keel knew Brandon was dead prior to the issuance of the subpoenas at the map hearing; (4) Linda Icenhauer-Ramirez's failure to object to the jury instruction that "a person is criminally responsible if the result would not have occurred but for her conduct," even though her trial strategy was to argue Henderson's actions were intentional, but the consequences of those actions were unintentional; and (5) Linda Icenhauer-Ramirez's statement during the punishment phase to the defense's psychological expert that Henderson was distant and difficult to deal with. Am. Pet. at 7-8.

Henderson advances very specific complaints about how Linda and Robert Icenhauer-Ramirez handled the motion they filed to suppress evidence obtained in violation of Henderson's attorney-client privilege. Henderson contends the attorneys should have used the *ex parte* interviews Public Defender Hall and Defense Investigator Ninemire provided to the Travis County District Attorney's Office to demonstrate how, absent the actions and inactions of Hall, Ninemire, and/or Byington, law enforcement authorities would never have learned a map existed. The state habeas court found Linda and Robert Icenhauer-Ramirez's affidavits to be true and concluded neither provided ineffective assistance. *Ex Parte Henderson,* No. 94-2034, at 3-4, 9.

In her affidavit, Linda Icenhauer-Ramirez stated she went to Kansas City to interview Hall and Ninemire before the Travis County District Attorneys went there

and took Hall's and Ninemire's depositions. *See* SuppSHTr (reply) SX-PC 1 at 44. Her affidavit suggests she was aware the depositions took place, and the depositions were explicitly referenced when Hall was examined by attorneys during the hearing on the motion to suppress. *See* 9 SR 592-93, 613, 619-620. Through her investigation, Linda Icenhauer-Ramirez formed the opinion it was Hall's request for a map from law enforcement officials and statements to FBI officials that led authorities to figure out Henderson had drawn a map. *See* SuppSHTr (reply) SX-PC 1 at 44. Icenhauer-Ramirez pursued the motion to suppress in state court on the theory Hall had violated attorney client privilege when he had revealed the existence of a map. Tr. at 130-132 (motion to suppress); 425-444 (brief in support).[9] It was not unreasonable for the state court to conclude Linda Icenhauer-Ramirez did not perform deficiently just because she did not use the deposition testimony in the manner Henderson wishes she had. In his deposition, Hall never admitted he violated attorney-client privilege – on the contrary, he denied it. *See id.* at SX-PC 2 at 102. He did, however, admit he had asked for a map from law enforcement officials and they could have deduced why he was requesting it. *Id.* at 92. Therefore, this testimony did not necessarily add anything to the substance of what Linda Icenhauer-Ramirez already knew about Hall's actions and the Court cannot say Henderson's trial attorneys performed deficiently in this regard. Nor can the Court say Henderson was prejudiced

[9] Although Icenhauer-Ramirez filed an amended motion to suppress, Tr. at 347-350, she later withdrew it and pursued the original one and after the pretrial hearings eventually concluded on December 19, 1994, filed a brief in support in which she alleged Hall's violation of the attorney client privilege. *See* 13 SR 1124-1127; Tr. at 425-444.

by the trial attorneys' failure to use the deposition testimony, because in spite of hearing the live testimony of Hall and Ninemire, including testimony about Hall's request for the map, the trial court nevertheless denied the motion to suppress and it is unlikely the deposition testimony would have changed the result. *See* 9 SR 543-674.

Henderson also claims Linda and Robert Icenhauer-Ramirez performed deficiently when they, in preparing for the motion to suppress hearing, failed to investigate and discover the insecure nature of the room (known as the "red room") in Missouri in which Hall and Ninemire conducted their investigation. But in Icenhauer-Ramirez's affidavit, she stated that during her trip to Missouri to interview Hall and Ninemire, she became aware of the insecure nature of red room but after speaking with the two men, formed the opinion that there was no indication law enforcement had eavesdropped on their conversation with Henderson and therefore she did not believe there was any evidence to support a "government interference" claim. *See* SuppSHTr (reply) SX-PC 1 at 44. The state habeas court found Icenhauer-Ramirez's affidavit to be true. *See Ex Parte Henderson*, No. 94-2034, at 3, 9. Since Icenhauer-Ramirez did investigate and discover the nature of the red room, but also through her investigation came to believe no eavesdropping had occurred, it was not professionally unreasonable for her not to argue the evidence should have been suppressed due to government interference. *See, e.g., Hernandez v. Johnson,* 108 F.3d 554, 564 (5th Cir. 1997) (holding that it is not professionally unreasonable for an attorney not to pursue a claim not supported by the evidence).

Henderson next argues her trial attorneys, Linda and Robert Icenhauer-Ramirez, failed to investigate and challenge the communications between Henderson and another Travis County Jail inmates, including Bolivia Jackson, and failed to adequate pursue suppression of Henderson's statements to Jackson, who Henderson contends was acting as an agent of the state. The state habeas court found Linda Icenhauer-Ramirez's affidavit to be true specifically regarding Henderson's statements to Jackson. *Ex Parte Henderson,* No. 94-2034, at 7. In her affidavit, Icenhauer-Ramirez explains she first learned of Henderson's written statements to other inmates during the pretrial hearing, and that she recessed the hearing to talk to Henderson about them. *See* SuppSHTr (reply) SX-PC 1 at 45-46. The state court record confirms Icenhauer-Ramirez's account of events and demonstrates she objected right away at the November 14, 1994 pretrial hearing when the prosecution brought up the fact Henderson had made written and oral statements regarding whether Brandon was still alive to various inmates on fire watch. 11 SR 995-999. Icenhauer-Ramirez objected on the grounds the fire watch inmates were agents of the state. *Id.* She then asked for recess. *Id.* When the hearing resumed on November 15, she informed the Court she would not be able to proceed on the motion to suppress due to violation of attorney-client privilege without having time to investigate those statements and file an amended motion to compel. 12 SR 1000-1003. The Court agreed to allow Icenhauer-Ramirez time to prepare for the motion to suppress hearing due to the evidence of the statements to the inmates and recessed the pretrial hearing until December 19, 1994. 12 SR 1101. In her affidavit, Icenhauer-Ramirez explained she spoke to Henderson who admitted to her she had written the statements but had failed to tell

her attorneys about them. *See* SuppSHTr (reply) SX-PC 1 at 45-46. Icenhauer-Ramirez did file a motion to suppress the statement's to Jackson on the grounds Jackson was an agent of the state on December 9, 1994. Tr. at 389-90. Icenhauer-Ramirez then spoke to Bolivia Jackson and concluded she was not working as an agent for the sheriff. *See* SuppSHTr (reply) SX-PC 1 at 45-46. Therefore, Henderson's claim Icenhauer-Ramirez did not investigate Henderson's statements to Jackson or whether Jackson was an agent of the state are not supported by the record. And in so far as Henderson is arguing Icenhauer-Ramirez should not have abandoned the motion to suppress Henderson's statements to Jackson, the Court has already explained an attorney does not perform deficiently when she fails to pursue arguments without basis in law or fact. *See, e.g., Hernandez,* 108 F.3d at 564. The state habeas court thus did not apply *Strickland* unreasonably when it concluded Icenhauer-Ramirez had provided effective assistance.[10]

Henderson next alleges Linda Icenhauer-Ramirez performed deficiently when she failed to protect from the prosecution evidence she obtained from Ria Eller, a personal acquaintance of Sheriff Keel, that the sheriff knew Brandon was dead prior to the issuance of the subpoenas

[10] Additionally, Henderson cannot demonstrate she was prejudiced by Icenhauer-Ramirez's decision not to pursue the motion to suppress Henderson's statements to Jackson (and Icenhauer-Ramirez cannot be said to have rendered deficient performance, because, as the Court sets forth in more detail in Section VII, *infra*, any *Massiah* claim would have failed since Henderson's Sixth Amendment right to counsel had not attached. *See Koch v. Puckett,* 907 F.2d 524, 527 (5th Cir. 1990) (holding it is not professionally unreasonable to choose not to make frivolous objections, to advance futile arguments, or to pursue futile motions).

at the map hearing. Henderson alleges Icenhauer-Ramirez instructed her investigator, Drew McAngus, to turn the evidence over to the prosecution. "[C]onclusory allegations of ineffective assistance of counsel do not raise a constitutional issue in a federal habeas proceeding." *Miller v. Johnson,* 200 F.3d 274, 282 (5th Cir. 2000). Henderson in her petition does not specify why turning this information over to the prosecution constituted deficient performance or how it prejudiced the outcome of any hearing or her trial. As such, her ineffective assistance of counsel claim on this basis must be rejected. *Id.* (emphasizing that an ineffective assistance of counsel claim fails " '[i]n the absence of a specific showing of how [the attorney's] alleged errors and omissions were constitutionally deficient, and how they prejudiced his right to a fair trial,' " quoting *Barnard v. Collins,* 958 F.2d 634, 642 (5th Cir. 1992)).

Because it is equally unsupported, the Court must reject Henderson's claim Icenhauer-Ramirez provided ineffective assistance by making a prejudicial statement to the State's psychological expert. Henderson simply alleges "Linda Icenhauer-Ramirez stated to the State's psychological expert at punishment, Jeff Ezell, that her client was distant and difficult to deal with. Such statements prejudiced Ms. Henderson at her trial." Am. Pet. at 15. This contention of ineffective assistance is conclusory in that Henderson has not made a "specific showing" that her attorney's "alleged errors and omissions were constitutionally deficient." *Miller,* 200 F.3d at 282. Nor has she explained why the alleged error – the statement to the psychologist – prejudiced her right to a fair trial. *Id.* Consequently, Henderson has not succeeded in demonstrating

Icenhauer-Ramirez's deficient performance on this basis either.

Finally, Henderson complains Linda Icenhauer-Ramirez's failed to object to the jury instruction that "a person is criminally responsible if the result would not have occurred but for her conduct," even though the instruction was contrary to her trial strategy, which was to argue Henderson's actions were intentional but the consequences of those actions were unintentional, and because state law "mandates that a conviction for murder rest upon proof that the defendant consciously desired the result of her conduct." Am. Pet. at 15; *see also* Tr. 718. Of course the trial court's instruction that "a person is criminally responsible if the result would not have occurred but for her conduct" was its instruction on *causation* and is taken verbatim from the Texas Penal Code. TEX. PENAL CODE § 6.04 (entitled "Causation: Conduct and Results"). The trial court did properly instruct the jurors with regard to *intent* as well when it instructed them they could find Henderson guilty only if they found beyond a reasonable doubt she "knowingly or intentionally cause[d] the death of an individual, Brandon Baugh, an individual under six years of age. . . ." Tr. at 718. The court further defined "intentional act" as an act committed with "the conscious objective or desire to cause the result," and "knowing act" as an act committed when the actor "is aware that her conduct is reasonably certain to cause such a result." *Id.* Thus, the trial court instructed the jury on capital murder, murder, causation and intent in compliance with Texas law. *See* TEX. PENAL CODE § 19.03(a)(8) (defining as a capital offense murder of an individual under six years of age); § 19.02(b)(1) (defining murder as "intentionally or knowingly causing the death of an individual"); § 6.03(a).

(defining "intentionally"); 6.03(b) (defining "knowingly"); § 6.04 (addressing causation). Any objection to the instruction by Icenhauer-Ramirez would have been futile and therefore, she cannot be said to have performed deficiently for not making the objection. *See Koch v. Puckett,* 907 F.2d 524, 527 (5th Cir. 1990) (holding it is not professionally unreasonable to choose not to make frivolous objections, to advance futile arguments, or to pursue futile motions).

In sum, the trial court did not unreasonably apply *Strickland* in reaching its conclusion Robert and Linda Icenhauer-Ramirez provided constitutionally effective assistance to Henderson during her trial, and Henderson is therefore not entitled to habeas relief on this basis.

C. Appointed Appellate Counsel

Henderson also contends she received constitutionally ineffective assistance from her appellate counsel, Keith Hampton. Henderson did challenge the effectiveness of Hampton's assistance in her state habeas proceedings and the state habeas court concluded his "representation of [Henderson] on appeal was competent" and held Hampton did not render deficient or prejudicial performance. *Ex Parte Henderson,* No. 94-2034, at 5. In her habeas petition, Henderson contends the following actions and inactions on the part of Hampton constituted deficient performance: (1) failing to designate on appeal the transcript of the *in camera* hearing where the trial judge opined the victim was dead; (2) failing to object to the trial judge's findings of fact and conclusions of law; and (3) failing to allege the violations of attorney-client privilege that occurred violated the Sixth Amendment. Am. Pet. at 15-16.

Henderson's first complaint is Hampton either failed to designate the appellate record or the state clerk failed to transmit the transcript of the *in camera* hearing that took place in the trial judge's chambers during which the trial judge expressed his belief to Byington that Brandon was dead. This claim fails because Henderson cannot show how the omission of the trial judge's opinion that Brandon was dead prejudiced her appeal. What was important to the appellate court was what the *authorities* believed at the time they were seeking the production of the map. *See Henderson,* 962 S.W.2d at 557. Although the appellate court conceded the map was protected by attorney-client privilege, it repeatedly emphasized the important public policy consideration was to examine the situation from the perspective of the law enforcement authorities:

> [T]he attorney-client privilege was legitimately required to yield to the strong public policy interest of protecting a child from death or serious bodily injury. At the time the trial court compelled production of the maps, *authorities* had reason to believe the baby might still be alive. [Henderson] had initially given conflicting stories to the FBI, and at least one of those stories indicated that Brandon was still alive. While [Henderson] later claimed the baby was dead, *law enforcement officials* were not bound to take her word for the matter. Further, she later told another inmate in Texas that the baby had been dropped off alive in Missouri to be taken to Oklahoma. Although the maps indicated a grave site and were consistent with [Henderson's] claim that the baby was dead and buried near Waco, *law enforcement officials* were entitled to believe that [Henderson] could be telling half-truths and that the maps might lead to a live

> baby. Even if *authorities* believed that the chance of the maps leading to a live baby was remote, they were entitled to pursue that remote possibility. [Footnote omitted]. If the child had been abandoned, or secreted with an accomplice of Henderson's, his life or health might have been in jeopardy. Hence, authorities could obtain the maps in an attempt to terminate a kidnapping.

Henderson, 962 S.W.2d at 557 (emphasis added). The court's focus on the mind-set of the authorities, as opposed to the belief of the judge, is further emphasized in a footnote in which the court comments on the sincerity of the authorities' beliefs and the fact that it was the trial judge's role to evaluate that sincerity. *Id.* at 557 n.12. In other words, what mattered on appeal was whether the trial judge believed the law enforcement officers when they said they thought there was a chance Brandon was still alive, not what the trial judge himself believed about whether Brandon was alive. As such, even assuming *arguendo* Hampton performed deficiently in failing to ensure the appellate court had the record of the trial judge's statement,[11] Henderson has not demonstrated how the alleged error prejudiced her on appeal and is therefore not entitled to habeas relief on this basis.

Henderson next argues Hampton performed deficiently when he failed to filed formal objections to the trial judge's findings of fact and conclusions of law. Am. Pet. at 16. She does not specify in her petition what the substance of such objections should have been. *Id.* However, it is clear from the record Hampton did file a motion for new

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[11] The Court notes Henderson herself admits she is not even sure whether the error was Hampton's or the state clerk's. Am. Pet. at 16.

trial, in which he challenged the trial judge's conclusion that Henderson was precluded from attempting to suppress any evidence on the grounds that she failed to meet the burden of proof at the hearing on the motion to compel and argued the trial judge erred in overruling Henderson's motion to suppress. *See* Tr. at 762. In his affidavit, Hampton states his belief that a formal objection was unnecessary to protect Henderson's interests on appeal because Hampton filed a motion for new trial that outlined the trial court's errors. *See* SuppSHTr (Reply) SX-PC 6 at 142. The state habeas court found Hampton's affidavit to be true. Ex Parte Henderson, No. 94-2034 at 5. As such, Henderson has not succeed in showing Hampton's filing of a motion for new trial instead of formal objections constituted an exercise of unreasonable professional judgment as *Strickland* requires. Neither has she succeeded in demonstrating she was prejudiced by her failure to file objections. Accordingly, Henderson is not entitled to relief on this claim.

Finally, Henderson contends, in a general and conclusory manner, that Hampton performed deficiently when "he did not allege or contend the violations of attorney-client privilege which occurred violated the Sixth Amendment." Am. Pet. at 16. The record itself belies this contention, as Hampton did in fact argue in his appellate brief that Hall's disclosure of the existence of the maps violated Henderson's Sixth Amendment rights. *See* Brief of Appellant,[12] at 93-94, filed in *Henderson v. State,* 962 S.W.2d 544 (Tex. Crim. App. 1997). Consequently, Henderson has not demonstrated Hampton performed in the manner she

[12] Henderson's (and the State's) brief is located in Volume 3 of the 13 volumes of state court records provided to the Court.

alleges, let alone deficiently. Therefore, she is not entitled to habeas relief on this basis either.

VI. Due Process Violations

A. Findings of Fact and Conclusions of Law

Henderson's next claim for habeas relief concerns the findings of fact and conclusions of law the trial judge entered on her motion to suppress the map after the trial in her case. Her complaint is threefold: (1) the trial judge entered the findings of fact and conclusions of law after the trial had ended and he had already ruled on the motion for new trial; (2) the trial judge did not request the parties provide him with proposed findings of fact and conclusions of law, did not hear arguments on proposed findings of fact and conclusions of law, failed to provide Henderson with notice he was going to enter findings of fact and conclusions of law, and failed inform Henderson the State had provided him with proposed findings of fact and conclusions of law: and (3) the trial judge's findings of fact and conclusions of law are not supported by the evidence that was before him at the time. Am. Pet. at 16-21;[13] Pet. Ex. GG (Findings of Fact and Conclusions of Law).

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[13] In addition to arguing these actions by the trial court violated her due process rights, Henderson glibly asserts they violated her Sixth Amendment rights. However, she fails to articulate how or why her Sixth Amendment rights were violated by the state trial judge's tardy entry of findings of fact and conclusions of law, and as such, she has not demonstrated she is entitled to habeas relief. *See Ross v. Estelle*, 694 F.2d 1008, 1012 (5th Cir.1983) ("[M]ere conclusory allegations do not raise a constitutional issue in a habeas proceeding.").

The Supreme Court has stated on several occasions that "federal habeas corpus relief does not lie for errors of state law." *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990). Moreover, "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). Therefore, in so far as Henderson is complaining the manner in which the trial court handled entering its findings of fact and conclusions of law on the motion to suppress did not comport with Texas procedural law, Henderson has not stated a claim for federal habeas relief. And if she is contending that the manner in which the judge handled entering the findings of fact and conclusions of law – that is, the timing, the fact he did not ask for proposed findings or inform Henderson he had received proposed findings and conclusions from the State – runs afoul of her right to due process guaranteed by the Constitution, Henderson can only state a claim if she can show the trial committed an error that rendered her trial fundamentally unfair. *Styron v. Johnson*, 262 F.3d 438, 454 (5th Cir. 2001) (iterating the test for generic due process habeas claims). A trial is rendered fundamentally unfair when "there is a reasonable probability that the verdict might have been different had the trial been properly conducted." *Id.*

Even according to Henderson's own rendition of events in her habeas application, the findings of fact and conclusions of law were entered well after the parties had argued extensively on the motion to suppress, submitted briefing, and even well after the judge had denied the motion. In fact, the findings of fact and conclusions of law

were entered after the trial ended. Therefore, it is hard to see how the judges admittedly late entry of the findings of fact and conclusions of law impacted the outcome of her case or even his decision of how to rule on that particular motion to suppress. Since the judge had already ruled against Henderson on the motion to suppress, the appellate court would have presumed the trial judge found the evidence presented by the State in support of its opposition to the motion to suppress persuasive, regardless of whether the judge entered findings of fact and conclusions of law. Furthermore, in so far as Henderson's complaint is that the findings of fact and conclusions of law were submitted *ex parte* and perhaps, that some *ex parte* communications had taken place between the state and the judge regarding the proposed findings and conclusions, she has failed to establish a due process violation. *See Cockrum v. Johnson*, 934 F. Supp. 1147 (ED. Tex. 1996) (explaining not all *ex parte* contacts between a judge and prosecutor deprive the defendant of a fair hearing and noting, for instance, the prosecutions submission of a proposed order to a judge outside the presence of defense counsel would not run afoul of due process), *overruled on other grounds*, 119 F.3d 297 (5th Cir. 1997); *see also James v. Collins*, 987 F.2d 1116, 1122-23 (5th Cir. 1993) (rejecting habeas petitioner's due process challenge to state court's findings of fact and conclusions of law based on petitioner's allegation the findings and conclusions were reached in an *ex parte* collaboration between the state and the court because the petitioner had ample opportunity to brief and argue her position to the state court).

Additionally, Henderson argues the trial judge's findings of fact and conclusions of law are not supported by the evidence that was before him at the time. Of course,

AEDPA affords a high degree of deference to the factual findings of the state court, and "they may be set aside only if they lack even fair support in the record." *Rushen v. Spain*, 464 U.S. 114, 120 (1983). As the Court explained in the outset of its analysis, it must presume a state court's determination of a factual issue is correct unless the petitioner rebuts the presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). Although Henderson outlines in her petition which of the trial judge's findings and conclusions she considers unsupported by the evidence, she has not supported her allegations with clear and convincing evidence. And certainly, the record contains "fair support" for each of the state trial judge's findings. Accordingly, she has not demonstrated the state trial court's findings are not entitled to AEDPA deference.

B. Motion to Compel Map Hearing

Henderson also contends she is entitled to federal habeas relief because her Fourteenth Amendment due process rights and her Sixth amendment confrontation clause rights were violated when she was denied the right to be present at the February 7, 1994 hearing on the motion to compel Byington to produce the map Henderson had drawn. Am. Pet. at 21. The state habeas court considered this claim and made specific factual findings and legal conclusions. *See Ex Parte Henderson*, No. 94-2034, at 6-7. First the court found although Henderson was not present at the hearing, Byington was and was represented by David Sheppard and Steve Brittain. *Id.* at 6. Second, the court found Henderson had not raised this claim on direct appeal. *Id.* Thus, the court concluded Henderson procedurally defaulted this claim. *Id.* at 7. Next, the court concluded this was not a hearing at which Henderson had

a right to appear. *Id.* at 7. Finally, the Court concluded Henderson's absence at the hearing would constitute harmless error, if it constituted error at all, because the trial court conducted subsequent hearings on Henderson's motion to suppress the map, at which point Henderson was afforded more than ample opportunity to represent her interests on the exact issue addressed at the motion to compel hearing. *Id.*

It is far from clear that Henderson's absence from the February 7, 1994 hearing in any way implicated her right to confrontation guaranteed under the Sixth and Fourteenth Amendments, considering: (1) the hearing took place before trial commenced and during the grand jury investigation; (2) the attorneys[14] who represented Byington at the hearing vigorously defended that the map was protected by attorney-client privilege and cross-examined the State's witnesses; and (3) Henderson later had a chance to cross-examine the witnesses and present evidence in support of her position during the pre-trial hearings on her motions to suppress the map. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 52 (1987) (emphasizing "the right to confrontation is a *trial* right"); *Kentucky v. Stincer*, 482 U.S. 730, 740 (1987) (opining the important inquiry in deciding whether a defendant's right to confrontation has been violated is "whether excluding the defendant from the hearing interferes with his opportunity for effective cross-examination."). At the very least, the Court

[14] In Henderson's response, she points out while her attorney Byington was at the hearing, she appeared through her counsel Steve Brittain and David Sheppard. Icenhauer-Ramirez, Henderson's trial attorney, attended the hearing but did not participate. *See* Responsive Pldg. at 25.

cannot hold the state habeas court *unreasonably* applied clearly established federal law in concluding Henderson did not have a right to be at the map hearing.

But even assuming Henderson could establish her right to confrontation was violated, it would be subject to a harmless-error analysis. *See Arizona v. Fulminate*, 499 U.S. 279, 306-07 (1991) (collecting cases where the Supreme Court has applied a harmless error analysis, including cases involving confrontation rights violations). As such, this Court may grant "habeas relief only if it determines that the constitutional error 'had substantial and injurious effect or influence in determining the jury's verdict.'" *Burgess v. Dretke*, 350 F.3d 461, 466-467 (5th Cir. 2003) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993). It was not an unreasonable application of established federal law for the state habeas court to conclude any error generated by Henderson's physical absence from that hearing was harmless, considering Henderson moved to suppress the map, the state court held extensive hearings on the suppression motion at which Henderson's attorney was able to cross examine the State's witnesses, her attorney filed a brief on her behalf; and she was nevertheless unsuccessful in getting the map suppressed. These intervening events cut off any inference that what happened at the February 7, 1994 hearing influenced her ultimate conviction.[15]

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[15] The Court notes Henderson's only and unilluminating response to Respondent's argument that the state court was not unreasonable in concluding any error was harmless is this statement in her responsive pleading: "Clearly, as opposed to Respondent's arguments, the error in this case was not harmless and did have substantial an injurious effect and/or influence of the verdict of the jury." Responsive Pldg. at 30.

C. Exculpatory Evidence

Henderson contends her Fourteenth Amendment due process rights were violated under the rule announced in *Brady v. Maryland*, 373 U.S. 83 (1963) when the prosecution failed to turn over exculpatory evidence. Am. Pet. at 23. In *Brady*, the Supreme Court held the prosecution must disclose exculpatory evidence upon the defendant's request if the evidence is material to guilt or punishment. 373 U.S. at 87. Henderson states in her petition she did request the State produce all material and exculpatory evidence and the trial court granted that request. Am. Pet. at 24. Evidence is material and, thus, must be disclosed under *Brady* if there is a reasonable probability that the result of the proceeding would have been different if the evidence had been disclosed to the defense. *United States v. Bagley*, 473 U.S. 667, 682 (1985). The state habeas court concluded Henderson had failed to establish a *Brady* violation and thus Henderson is entitled to relief only if she can demonstrate this conclusions was reached through an unreasonable application of clearly established federal law. *See Ex Parte Henderson*, No. 94-2034 at 9; 28 U.S.C. § 2254(d).

Although the exact nature of the evidence she is claiming was not turned over to her is not clear from her petitions, Henderson appears to be arguing the State failed to turn over evidence that Hall and Ninemire confirmed in their interviews with District Attorney Robert Smith that Henderson had created a map. Am. Pet. at 23. The state court found neither Hall nor Ninemire revealed any of the substance of their conversations with Henderson. *See Ex Parte Henderson*, No. 94-2034 at 9. Additionally, the state court found as true the affidavit of District Attorney Smith. *Id.* In that affidavit, District

Attorney Smith represented he had his interviews of Hall and Ninemire transcribed and a copy of the transcriptions were given to Henderson's attorney during discovery, prior to the pretrial hearings. *See* SuppSHTR (Reply) at SX-PC 8, at 155. Since Henderson has not produced clear and convincing evidence to rebut these factual findings, the Court must accept them as true under AEDPA. 28 U.S.C. § 2254(e)(1). And since these facts establish the prosecution turned over the evidence that Henderson alleges reveals Ninemire and Hall confirmed the existence of the map, she has failed to demonstrate a *Brady* violation.

D. Trial Court Consultation with Outside Expert

Henderson maintains her Fourteenth Amendment due process rights were violated when the trial court judge consulted with an outside expert in ruling on the motion to compel the map (thereby receiving evidence outside the courtroom) and subsequently failed to recuse himself from presiding over other proceedings. Am. Pet at 24. The state habeas records a contain a transcript of the hearing on Henderson's motion to recuse Judge Wisser, which was heard by Thomas Blackwell of the 299th District Court, Travis County, Texas, on September 1, 1994. *See* Mot. to Recuse Tr. at 4.[16] During the hearing, Judge Wisser admitted that after he heard evidence on the State's motion to compel Byington to produce the map at the February 7, 1994 hearing and before he ruled on that motion on February 8, 1994, he spoke to Guy Wellborn, a professor of

[16] The transcript is located in the second of the 13 volumes of state court records provided to the Court.

evidence at the University of Texas School of Law, regarding the law of attorney-client privilege and how it might apply to the facts in this case. *Id.* at 17-24.

Respondent contends Henderson's claim for habeas relief of the grounds Judge Wisser sought the counsel of an outside expert is procedurally barred because the state court rejected it on appeal on an independent and adequate state ground. On appeal, Henderson Argued the trial court's denial of her motion to recuse was erroneous because Judge Wisser's *ex parte* consultation with an outside expert violated her constitutional due process rights. *See* Brief of Appellant,[17] at 116-118, filed in *Henderson v. State*, 962 S.W.2d 544 (Tex. Crim. App. 1997). The Court of Criminal Appeals held Henderson was barred from asserting this argument on appeal because she failed to timely object once Judge Wisser notified the parties he had contacted an outside source. *Henderson*, 962 S.W.2d at 559. Specifically, the appellate court stated:

> [Henderson] has failed to preserve error for review. While Judge Wisser did not name the person he consulted at the time he delivered his order, he at least notified the parties that he had consulted someone from the law school. At that point in time, [Henderson] should have objected, asked for the source and substance of the information, and requested an opportunity to respond or additional time to prepare a response. [Henderson] failed to do so. Hence, appellant had an opportunity to remedy the error of which she now complains. [In fact, Judge Wisser indicated,

[17] Henderson's (and the State's) appellate brief is located in the third of the 13 volumes of state court records provided to the Court.

> during the motion to recuse hearing, that he would have given the parties an opportunity to respond if a request had been made]. Having failed to take that opportunity, she has procedurally defaulted her point of error. Tex.R.App. P. 52(a); *Hollins v. State*, 805 S.W.2d 475, 476-477 (Tex.Crim.App.1991). *See also Cockrell v. State*, 933 S.W.2d 73, 89 (Tex.Crim.App.1996), *cert. denied*, 520 U.S. 1173, 117 S.Ct. 1442, 137 L.Ed.2d 548 (1997).

Henderson, 962 S.W.2d at 559. As the Court explained, *supra*, in Section IV.A, when a state court decision rests on a state procedural ground independent of a federal claim and adequate to support the judgment, federal courts lack jurisdiction to review the merits of the case. *Coleman*, 501 U.S. at 729. The Fifth Circuit has repeatedly held the Texas contemporaneous objection rule constitutes an adequate and independent state ground. *E.g., Smith v. Cockrell,* 311 F.3d 661, 683 (5th Cir. 2002) ("This court has consistently held that this rule requiring contemporaneous objections constitutes an adequate and independent state ground sufficient to create a procedural bar for federal habeas review of the petitioner's claim."). Because the Court of Criminal Appeals unequivocally rejected Henderson's claim the trial court should not have denied her motion to recuse because her rights were violated by Judge Wisser's *ex parte* consultation with an outside expert on the grounds she failed to contemporaneously object, this Court is procedurally barred from reviewing the merits of the claim.

VII. Massiah Violations

Henderson also contends her Sixth Amendment right to effective assistance of counsel was violated under the rule announced in *Massiah v. United States*, 377 U.S. 201 (1964), when the police placed her under "fire watch" in order to obtain incriminating statements from her. Am. Pet. at 22. According to Henderson, she was transported back to the Travis County Jail after her arrest in Missouri and placed in solitary confinement. *Id.* The authorities requested inmates, including Bolivia Jackson, watch Henderson. *Id.* During this time, Henderson corresponded in writing with Jackson and other inmates and informed Jackson that Brandon was still alive and had been picked up by his grandmother and she could draw a map to the point in Missouri where she dropped off Brandon. *See* Pet. Ex. HH. In her petitions, Henderson contends Jackson was acting as an agent of the state and attempting in her correspondence with Henderson to elicit statements that Brandon was still alive. Am. Pet. at 22.

The Supreme Court in *Massiah* established "that an accused has a Sixth Amendment right to be free of questioning by an undisclosed government informant in the absence of his counsel." *United States v. Johnson*, 954 F.2d 1015, 1019 (5th Cir. 1992) (citing *Massiah*, 377 U.S. at 206). Hence, there can be no *Massiah* violation unless the accuser's Sixth Amendment right to counsel has attached. *See Moulton*, 474 U.S. at 179-80 (explaining the *Massiah* rule applies to protect the accused against the admission of incriminating statements made after the Sixth Amendment right to counsel attaches). In Section IV, *supra*, the Court explained Henderson's Sixth Amendment right to counsel did not attach on the capital murder charge until February 9, 1994. Henderson's correspondence and

communication with Jackson occurred prior to that date. *See* Pet. Ex. HH. Accordingly, Henderson has not demonstrated her Sixth Amendment right was violated or that she entitled to habeas relief on this claim.

VIII. Constitutionality of Texas Capital Child Murder Statute

Under Texas law, the murder of a child under six years of age is defined as a capital murder. TEX. PENAL CODE § 19.03(a)(8). Henderson contends this child capital murder statute, under which she was convicted, violates the Equal Protection Clause of the Fourteenth Amendment and the Cruel and Unusual Punishment Clause of the Eighth Amendment since it arbitrarily subjects those who murder children under six years of age to the death penalty while categorically exempting those who murder children over six years of age from the death penalty. However, the Fifth Circuit has upheld the constitutionality of § 19.03(a)(8) under identical Eighth Amendment and equal protection challenges. *Styron v. Johnson*, 262 F.3d 438, 451-53 (5th Cir. 2001) (holding the child capital murder statute survives equal protection challenge under rational basis review and satisfies the requirements imposed by the Eighth Amendment), *cert. denied*, 534 U.S. 1163 (2002). As such, Henderson is not entitled to habeas relief on this claim.

IX. Coercion of Incriminating Statements

As her final grounds for relief, Henderson argues her Fifth and Fourteenth Amendment rights were violated when FBI Agent Napier in Missouri coerced her into involuntarily confessing. Am. Pet. at 26. Henderson also

asserted this argument on direct appeal, maintaining the trial court improperly overruled her motion to suppress her confession, and the Texas Court of Criminal Appeals rendered the following relevant factual findings:

> Early in the interview, Agent Napier told [Henderson] that she was at a crossroads, that she could determine which path to take, and that she could tell her story or let the justice system take its course. Later in the interview, [Henderson] offered to tell everything she knew in exchange for staying in Missouri. In response, Napier asked questions such as: "What do you mean?" "What's everything?" Napier never promised [Henderson] that she could stay in Missouri, and in fact, told her that he was not in a position to make any bargains, deals, or promises. He also told her that the people in a position to make a deal would want to have a basis for making their decision. Later, through leading questions, Napier elicited from [Henderson] a confession that she killed the baby. He asked [Henderson] "When you say the whole thing are you talking about that Brandon is dead, that you know where the body's located, that it was an accident, that you're sorry?" [Henderson] responded by nodding her head. Later Napier stated, "Brandon's dead. It was an accident" To this statement, [Henderson] replied, "Yes." Napier asked, "Did you bury him." [Henderson] responded, "Of course, I did. He's just a baby." Subsequent interrogation led to [Henderson]'s statement that she had buried Brandon in a wooded area near Waco. At that point, Napier asked [Henderson] to draw a map so that the authorities could find Brandon. Napier talked about Brandon's parents and talked about their need to "put closure" on this

> episode. [Henderson], however, refused to draw a map.

Henderson, 962 S.W.2d at 563-564. As Henderson has not submitted clear and convincing evidence to rebut these factual findings, the Court presumes them true. 28 U.S.C. § 2254(e)(1). Ultimately, the Court of Criminal Appeals concluded Henderson's confession did not run afoul of the Constitution, because it was voluntary and uncoerced, *Henderson*, 962 S.W.2d at 565, and therefore Henderson is entitled to habeas relief only if she can show this conclusion is unreasonable in light of the clearly established federal law. 28 U.S.C. § 2254(d).

The Fifth Circuit directs a court determining the voluntariness of a confession to evaluate whether "under the 'totality of the circumstances,' the statement is the product of the accused's 'free and rational choice.'" *United States v. Restrepo*, 994 F.2d 173, 183-184 (5th Cir.1993) (quoting *United States v. Doucette*, 979 F.2d 1042, 1045 (5th Cir. 1992)). The government bears the burden of proving by a preponderance of the evidence that the accused voluntarily waived her rights and that the statements she made were voluntary. *Id.* "A confession is voluntary in the absence of official overreaching, in the form of either direct coercion or subtle psychological persuasion. *Id.* The record indicates Henderson was read her constitutional rights and signed a formal waiver that she understood those rights before the FBI interview commenced. *See* 8 SR 253-56. Additionally, Henderson's claim that Agent Napier engaged in psychological persuasion is foreclosed by the findings of the Texas Court of Criminal Appeals, unrebutted by Henderson, that: (1) Agent Napier never promised Henderson she could stay in Missouri, and (2) Henderson's confession could never have

been induced by Napier's statements that Brandon's parents needed closure because those statements were made after Henderson confessed. Henderson, 962 S.W2d at 564. Because the Texas Court of Criminal Appeals did not unreasonably apply federal law in determining Henderson's confession to FBI Agent Napier was not coerced, Henderson is not entitled to habeas relief on this claim.

Conclusion

Having reviewed the entire trial court record and transcript and the state habeas record, the Court finds the state habeas court's denial of Henderson's habeas petition was neither (1) contrary to, or an unreasonable application of, clearly established federal law, nor (2) based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding, under the AEDPA. *See* 28 U.S.C. § 2254(d). Accordingly, Henderson's federal habeas petition must be denied. In accordance with the foregoing:

IT IS ORDERED that Respondent's Motion for Summary Judgment [#12] is GRANTED;

IT IS FURTHER ORDERED that Petitioner Cathy Lynn Henderson's Petition's for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 [#5, 7, 12] are DENIED.

SIGNED this the 31st day of March 2004.

/s/ Sam Sparks
SAM SPARKS
UNITED STATES
DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CATHY LYNN HENDERSON,

Petitioner,

-vs- **Case No. A-02-CA-758-SS**

DOUG DRETKE,

Respondent.

ORDER

(Filed Jun. 10, 2004)

BE IT REMEMBERED on the 10th day of June 2004 the Court reviewed the file in the above-styled cause, and specifically Petitioner's Motion to Alter or Amend the Judgment Under Rule 59(e) of the Federal Rules of Civil Procedure [#31] and Petitioner's Amended Motion to Alter or Amend the Judgment Under Rule 59(e) of the Federal Rules of Civil Procedure [#32]. Having considered the motions, the relevant law, and the case file as a whole, the Court now enters the following opinion and orders.

I.

This case is a capital habeas petition brought pursuant to 28 U.S.C. § 2254. On March 31, 2004, the Court entered an order and judgment granting summary judgment to the Respondent and denying Petitioner Cathy Lee Henderson's claims under Section 2254. On April 14, 2004, Henderson pursuant to Rule 59(e) of the Federal Rules of Civil Procedure filed a motion to alter or amend the

judgment entered by this Court. On April 29, 2003, she filed an amended motion to alter or amend correcting the typographical errors in the first motion. Under Rule 59, a party must file any motion for new trial no later than ten days after the entry of the final judgment. FED. R. CIV. P. 59(b). A court may, in its discretion, grant a new trial based on a prejudicial error of law or if the verdict is contrary to the weight of the evidence, resulting in injustice. *E.g., Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251 (1940).

Henderson contends the Court erred in its analysis of her claim that she received ineffective assistance of appellate counsel because: (1) not only did the appellate counsel fail to properly designate the entire state trial record for appeal, as the Court noted, he failed to notice that a number of pages were missing, specifically the pages transcribing the in-camera meeting between Nina Byington and the trial judge in the trial judge's chambers; and (2) the Court erroneously concluded that the omission of these pages on appeal did not prejudice Henderson on appeal.

II.

With regard to this claim, this Court held the following:

> Henderson also contends she received constitutionally ineffective assistance from her appellate counsel, Keith Hampton. Henderson did challenge the effectiveness of Hampton's assistance in her state habeas proceedings and the state habeas court concluded his "representation of [Henderson] on appeal was competent" and held Hampton did not render deficient or prejudicial performance. *Ex Parte Henderson,* No. 94-2034, at

5. In her habeas petition, Henderson contends the following actions and inactions on the part of Hampton constituted deficient performance: (1) failing to designate on appeal the transcript of the *in camera* hearing where the trial judge opined the victim was dead; (2) failing to object to the trial judge's findings of fact and conclusions of law; and (3) failing to allege the violations of attorney-client privilege that occurred violated the Sixth Amendment. Am. Pet. at 15-16.

Henderson's first complaint is Hampton either failed to designate the appellate record or the state clerk failed to transmit the transcript of the *in camera* hearing that took place in the trial judge's chambers during which the trial judge expressed his belief to Byington that Brandon was dead. This claim fails because Henderson cannot show how the omission of the trial judge's opinion that Brandon was dead prejudiced her appeal. What was important to the appellate court was what the *authorities* believed at the time they were seeking the production of the map. *See Henderson [v. State,* 962 S.W.2d 544, 557 (Tex. Crim. App. 1997)]. Although the appellate court conceded the map was protected by attorney-client privilege, it repeatedly emphasized the important public policy consideration was to examine the situation from the perspective of the law enforcement authorities:

> [T]he attorney-client privilege was legitimately required to yield to the strong public policy interest of protecting child from death or serious bodily injury. At the time the trial court compelled production of the maps, *authorities* had reason to believe the baby might still be alive. [Henderson] had initially given conflicting stories to the FBI,

> and at least one of those stories indicated that Brandon was still alive. While [Henderson] later claimed the baby was dead, *law enforcement officials* were not bound to take her word for the matter. Further, she later told another inmate in Texas that the baby had been dropped off alive in Missouri to be taken to Oklahoma. Although the maps indicated a grave site and were consistent with [Henderson's] claim that the baby was dead and buried near Waco, *law enforcement officials* were entitled to believe that [Henderson] could be telling half-truths and that the maps might lead to a live baby. Even if *authorities* believed that the chance of the maps leading to a live baby was remote, they were entitled to pursue that remote possibility. [Footnote omitted]. If the child had been abandoned, or secreted with an accomplice of Henderson's, his life or health might have been in jeopardy. Hence, authorities could obtain the maps in an attempt to terminate a kidnapping.

Henderson, 962 S.W.2d at 557 (emphasis added). The court's focus on the mind-set of the authorities, as opposed to the belief of the judge, is further emphasized in a footnote in which the court comments on the sincerity of the authorities' beliefs and the fact that it was the trial judge's role to evaluate that sincerity. *Id.* at 557 n.12. In other words, what mattered on appeal was whether the trial judge believed the law enforcement officers when they said they thought there was a chance Brandon was still alive, not what the trial judge himself believed about whether Brandon was alive. As such, even assuming *arguendo* Hampton performed deficiently

> in failing to ensure the appellate court had the record of the trial judge's statement, [footnote omitted] Henderson has not demonstrated how the alleged error prejudiced her on appeal and is therefore not entitled to habeas relief on this basis.

See March 31, 2004 Order at 27-29.

III.

The question for this Court is whether it was unreasonable for the state habeas court to conclude Henderson's appellate counsel's performance did not prejudice her appeal and therefore that she received effective assistance of counsel, which implies a conclusion that the allegedly deficient performance of Henderson's appellate counsel in omitting the transcript of the hearing in which the trial judge expressed his personal belief that the baby was dead did not prejudice her appeal. To establish prejudice, a petitioner must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Strickland v. Washington,* 466 U.S. 668, 694 (1984). A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Id.*

The explicit reasoning and overall tenor of the state appellate court opinion suggest a transcript of the trial judge's in-camera communications in which he expressed his personal belief the baby was dead would not in reasonable probability have changed the appellate court's conclusion that the trial court did not err in compelling the map and refusing to suppress the map. The appellate court assumed without deciding that the maps were confidential.

Henderson v. State, 962 S.W.2d 544, 551 (Tex. Crim. App. 1997). (Judge Wisser had held the maps were not protected by the attorney-client privilege because they were not confidential communications made for the purpose of obtaining or facilitating professional legal services.) The appellate court went on to hold that even when a communication is protected by attorney-client privilege, that privilege must at times yield to superior public policy concerns. The "strong public policy interest of protecting a child from death or serious bodily injury" is one of the interests to which attorney-client privilege must yield. *Henderson,* 962 S.W.2d at 557. Ultimately, the appellate court held the public policy interest in finding Brandon outweighed the attorney-client privilege because the evidence demonstrated a remote possibility Brandon might still be alive – a remote possibility the law enforcement officers were entitled to pursue. *Id.*

In reaching that conclusions, the appellate court evaluated the evidence presented to the trial court, not to ascertain whether the map was likely to protect a child from serious injury or death, *i.e.*, that it would likely lead to Brandon's safe return, but whether there was evidence to support even a remote expectation the map might result in Brandon's safe return. The Court notes that any inference that Brandon was still alive arose from statements by Henderson herself. That Judge Wisser did not believe this version of the facts after Byington spoke to him does not support a finding by this Court that the appellate court would not have likely found the public interest in protecting a child would militate in favor of pursuing even a tentative hope to find the child alive.

Henderson argues the trial judge's statements in the in-camera hearing that he believed the baby was dead

demonstrate he did not find credible the law enforcement officer's testimony that there was a chance they were dealing with an on-going kidnapping as opposed to a murder. Again, Henderson misses the point. The point is not whether the law enforcement officials actually believed there was an on-going kidnaping. The question was whether officers had been given information that the baby was still alive that they had the right to act upon, even if they thought it was more likely the baby was dead. The Court cannot overemphasize that any confusion regarding whether Brandon was alive or dead originated with statements from Henderson herself. Judge Wisser could have believed simultaneously: (1) that Brandon was dead, and (2) that there was a remote possibility that he was alive, and the law enforcement officials had some basis for believing Brandon was still alive. The Court simply cannot find that if the appellate court had been made aware the trial judge believed at the time of his ruling that Brandon was dead, there was a reasonable probability it would have decided Henderson's appeal differently. And therefore, the Court cannot hold that it was unreasonable for the state habeas court to conclude Henderson received effective assistance of trial counsel, since she cannot demonstrate prejudice by his failure to present this portion of the trial record to the appellate court.

In accordance with the foregoing:

IT IS ORDERED that Petitioner's Motion to Alter or Amend the Judgment Under Rule 59(e) of the Federal Rules of Civil Procedure [#31] and Petitioner's Amended Motion to Alter or Amend the Judgment Under Rule 59(e) of the Federal Rules of Civil Procedure [#32] are DENIED.

SIGNED this the 10th day of June 2004.

/s/ Sam Sparks
SAM SPARKS
UNITED STATE
DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS AUSTIN DIVISION

CATHY LYNN HENDERSON,

Petitioner,

-vs- **Case No. A-02-CA-758-SS**

DOUG DRETKE,

Respondent.

ORDER

(Filed Jul. 15, 2004)

BE IT REMEMBERED on this the 14th day of July 2004, the Court reviewed the file in the above-styled cause. On July 9, 2004, the petitioner filed a Notice of Appeal [#34] notifying the Court she is appealing this Court's order of March 31, 2004 denying her application for habeas corpus relief under 28 U.S.C. § 2254 and the Court's order of June 10, 2004 denying her Rule 59(e) motion to alter or amend judgment. Additionally, the petitioner filed a Motion for Issuance of a Certificate of Appealability [#35] in which she requests the Court certify for appeal all of the claims raised before this Court in her federal habeas petitions. Having considered the motion, the Court now enters the following opinion and orders.

Standard for Certificate of Appealability

Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") § 102, codified at 28 U.S.C. § 2253(c)(2), the Court may issue a certificate of appealability

"only if the applicant has made a substantial showing of the denial of a constitutional right." This standard "includes showing that reasonable jurists could debate whether the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel,* 529 U.S. 473 (2000) (internal quotations and citations omitted).

A petitioner need not show a likelihood of success on the merits to obtain a certificate of appealability (COA); however, a court may deny an application if petitioner's claim is "squarely foreclosed" by statute or clearly adverse legal authority. *Barefoot v. Estelle,* 463 U.S. 880, 894 (1983). In applying this standard, the Court notes the severity of the sentence faced by the petitioner – in this case, the death penalty – weighs in favor of granting the COA. *Id.* at 893. Indeed, in capital cases doubts as to whether issuance of a COA is proper must be resolved in favor of the petitioner. *Clark v. Johnson,* 202 F.3d 760, 763 (2000).

Application

In her application for certificate of appealability, Henderson seeks a certificate of appealability as to all 13 grounds for relief raised in her petition and supplemental petitions for writ of habeas corpus, namely:

1. Henderson's Sixth Amendment rights were violated when state law enforcement officials engaged in tactics that compromised the confidentiality of Henderson's communications with her lawyer;
2. Henderson's Sixth Amendment right to effective assistance of counsel was violated because Federal Public Defender Ron Hall revealed a privileged

communication to law enforcement officials – that Henderson had drawn a map indicating the location of the victim's body;

3. Henderson's Sixth Amendment right to effective assistance of counsel was violated because Nona Byington, a Texas attorney who represented Henderson before and whose counsel Henderson sought upon her return to Travis County, also informed law enforcement officials Henderson had drawn a map of where the victim was buried;

4. Henderson's Sixth Amendment right to effective assistance of counsel was violated because Steve Brittain, Nona Byington's attorney who represented Byington at the hearing on the motion to compel the map, did not adequately safeguard Henderson's rights when he attempted to plea bargain on behalf of Henderson;

5. Henderson's Sixth Amendment right to effective assistance of counsel was violated because her appointed trial attorney, Linda Icenhauer-Ramirez, did not adequately assist her on the matter of the map and because and Linda and Robert Icenhauer Ramirez, appointed co-counsel, did not provide constitutionally adequate assistance at her trial;

6. Henderson's Sixth Amendment right to effective assistance of counsel was violated because she received constitutionally inadequate assistance from her appellate counsel, Keith Hampton;

7. Henderson's Fourteenth Amendment due process rights and Sixth Amendment confrontation rights were violated when the trial court rendered findings of fact and conclusions of law on her motion to suppress *ex parte*;

8. Henderson's Fourteenth Amendment due process rights and Sixth Amendment confrontation rights were violated when the trial court denied Henderson the right to be present at the hearing on the motion to compel the map's production;

9. Henderson's Sixth Amendment right to effective assistance of counsel was violated under the rule announced in *Massiah v. United States,* 377 U.S. 201 (1964), when the police placed her under fire watch in order to obtain incriminating statements from her;

10. Henderson's Fourteenth Amendment due process rights were violated under the rule announced in *Brady v. Maryland,* 373 U.S. 83 (1963), when the prosecution failed to turn over exculpatory evidence;

11. Henderson's Fourteenth Amendment due process rights were violated when the trial court judge consulted with an outside expert in ruling on the motion to compel the map (thereby receiving evidence outside the courtroom) and subsequently failed to recuse himself;

12. Henderson' s constitutional rights were violated because she was convicted under the Texas child capital murder statute, TEX. PENAL CODE § 19.03(a)(8), which on its face violates the Equal Protection Clause of the Fourteenth Amendment and the Cruel and Unusual Punishment Clause of the Eighth Amendment; and

13. Henderson's Fifth and Fourteenth Amendment rights were violated because her statement to FBI Agent Napier in Missouri was involuntary and coerced.

The Court extensively addressed and rejected each of these claims in its opinion issued on March 31, 2004 and stands

by its rulings and analysis today. However, there are two issues that warrant further attention by the appellate court in that reasonable jurists might disagree with their resolution by this Court: (1) the application of the rule announced by the Supreme Court in *Texas v. Cobb,* 532 U.S. 162 (2001), to this case; and (2) whether Henderson's appellate counsel rendered constitutionally inadequate assistance.

A. Sixth Amendment Claims and *Texas v. Cobb*

On March 31, 2004, the Court entered an Order granting the respondent's motion for summary judgment on all claims raised by Henderson and denying Henderson's application for federal habeas relief. The Court granted the respondent's motion for summary judgment on several of the petitioner's Sixth Amendment claims on the grounds her Sixth Amendment right to counsel did not attach to the capital murder charge until February 9, 1994 under the rule announced by the Supreme Court in *Texas v. Cobb.*[1] As the Court addressed at length in its March 31, 2004 opinion, the Sixth Amendment right to counsel attaches at the initiation of "adversary judicial proceedings," *Michigan v. Jackson,* 475 U.S. 625, 629-30 (1986), "'whether by way of formal charge, preliminary hearing,

[1] The Court's Sixth Amendment/*Texas v. Cobb* analysis served as the basis for awarding respondent summary judgment on Grounds Two, Three, Four and Nine, as well the alternative basis for awarding summary judgment on Ground One, and its basis for awarding summary judgment on Henderson's ineffective assistance of trial counsel claim (Ground Five), but only with regard to her claim her trial counsel provided ineffective assistance at the map hearing. The primary reason the Court awarded summary judgment on Ground One was the claim is procedurally barred.

indictment, information, or arraignment.'" *Brewer v. Williams,* 430 U.S. 387 398 (1977) (quoting *Kirby v. Illinois,* 406 U.S. 682, 689 (1972)). However, the Sixth Amendment right is offense specific. *See Cobb,* 532 U.S. at 167-68 (holding the Sixth Amendment right to counsel attaches only to the charged offenses and there is no exception for crimes that are "factually related" to a charged offense). Thus, the fact that the conduct about which Henderson complained in Counts One, Two, Three, Four, Five (regarding her representation during the map hearing only) and Nine took place before the initiation of formal adversarial proceedings on the capital murder charge on February 9, 1994 forecloses that conduct from giving rise to a claim by Henderson under the Sixth Amendment.

The *Texas v. Cobb* rule, addressed at length in the Court's March 31, 2004 opinion, has always struck this Court as harsh and in this situation, where Henderson was at the time of the allegedly problematic conduct charged with kidnaping the same child she was eventually charged with murdering, there seems significant danger of gamesmanship by authorities. However, it is the duty of this Court to follow precedent as set forth by the Supreme Court and the Fifth Circuit, not to carve out new exceptions to the established rules. Yet, in this case, with its extreme factual scenario, the petitioner should be at least be able to argue to the Fifth Circuit that the existing precedent is distinguishable and a different conclusion than the one reached by the Court in this case is warranted. Therefore, the Court will grant Henderson's application for certificate of appealability on Grounds One, Two, Three, Four, Five (ineffective assistance of Linda Icenhauer-Ramirez regarding the map only), and Nine.

B. Ineffective Assistance of Appellate Counsel

The Court granted the respondent's motion for summary judgment on the petitioner's ineffective assistance of appellate counsel claims on the grounds it was not unreasonable for the state court to conclude she received constitutionally effective assistance because Henderson had failed to demonstrate she was prejudiced on appeal by her appellate counsel's failure to designate as part of the appellate record the transcript of the *in camera* hearing that took place in the state trial judge's chambers during which the trial judge expressed his personal belief the infant-victim was already dead. In addition to addressing this claim at length in its March 31, 2004 order, the Court addressed this claim again in its June 10, 2004 order denying Henderson's motion to alter or amend judgment. For the reasons set forth in the June 10, 2004 opinion, this Court determined it was reasonable for the state courts to conclude that Henderson had not demonstrated but for appellate counsel's omission of the transcript of the *in camera* hearing from the appellate record, there was a "reasonable probability" that the result of the appeal would have been different, that is to say, "a probability sufficient to undermine confidence in the outcome" of her appeal. *Strickland v. Washington,* 466 U.S. 668, 694 (1984). However, reasonable jurists might disagree with the reasoning and conclusions of this Court's June 10, 2004 opinion and its analysis regarding this claim in its March 31, 2004 opinion. Therefore, the Court will grant Henderson's application for certificate of appealability on Ground Six, the alleged ineffective assistance of her appellate counsel.

Conclusion

In sum, Henderson has demonstrated that reasonable jurists might disagree with the Court's resolution of her Sixth Amendment claims under the rule announced in *Texas v. Cobb* and that reasonable jurists might resolve her ineffective assistance of appellate counsel claim differently. However, for the reasons stated in the Court's extensive opinion issued March 31, 2004 denying the petitioner's application for habeas corpus relief filed under 28 U.S.C. § 2254, which are incorporated by reference herein, the Court concludes Henderson's remaining claims are is squarely foreclosed by statute or clearly adverse legal authority and do not merit the issuance of a certificate of appealability.

In accordance with the foregoing:

IT IS ORDERED that the Petitioner Cathy Lee Henderson's Application for Certificate of Appealability [#35] is GRANTED as to Grounds One, Two, Three, Four, Five (ineffective assistance of Linda Icenhauer-Ramirez regarding the map only), Six and Nine and DENIED as to the remaining Grounds asserted by Henderson in her petitions for habeas relief.

SIGNED this 14th day of July 2004.

/s/ Sam Sparks
SAM SPARKS
UNITED STATES
DISTRICT JUDGE

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 04-70032

CATHY HENDERSON

Petitioner-Appellant

v.

NATHANIEL QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION

Respondent-Appellee

Appeal from the United States District Court for the Western District of Texas, Austin

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ON PETITION FOR REHEARING EN BANC

(Filed Sep. 13, 2006)

(Opinion 8/11/06, 5 Cir., ___ , ___ F.3d ___)

Before JONES, Chief Judge, and BARKSDALE and PRADO, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P.

and 5th CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5th CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Rhesa Hawkins Barksdale
United States Circuit Judge

APPENDIX G

CONSTITUTION OF THE UNITED STATES OF AMERICA

Amendment Five:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment Six:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

APPENDIX H

PENAL CODE OF THE STATE OF TEXAS

Section 19.02. Murder

(a) In this section:

(1) "Adequate cause" means cause that would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper, sufficient to render the mind incapable of cool reflection.

(2) "Sudden passion" means passion directly caused by and arising out of provocation by the individual killed or another acting with the person killed which passion arises at the time of the offense and is not solely the result of former provocation.

(b) A person commits an offense if he:

(1) intentionally or knowingly causes the death of an individual;

(2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual; or

(3) commits or attempts to commit a felony, other than manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.

(c) Except as provided by Subsection (d), an offense under this section is a felony of the first degree.

(d) At the punishment stage of a trial, the defendant may raise the issue as to whether he caused the death under the immediate influence of sudden passion arising from an adequate cause. If the defendant proves the issue in the affirmative by a preponderance of the evidence, the offense is a felony of the second degree.

Section 19.03. Capital Murder

(a) A person commits an offense if the person commits murder as defined under Section 19.02(b)(1) and:

(1) the person murders a peace officer or fireman who is acting in the lawful discharge of an official duty and who the person knows is a peace officer or fireman;

(2) the person intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated sexual assault, arson, obstruction or retaliation, or terroristic threat under Section 22.07(a)(1), (3), (4), (5), or (6);

(3) the person commits the murder for remuneration or the promise of remuneration or employs another to commit the murder for remuneration or the promise of remuneration;

(4) the person commits the murder while escaping or attempting to escape from a penal institution;

(5) the person, while incarcerated in a penal institution, murders another:

(A) who is employed in the operation of the penal institution; or

(B) with the intent to establish, maintain, or participate in a combination or in the profits of a combination;

(6) the person:

(A) while incarcerated for an offense under this section or Section 19.02, murders another; or

(B) while serving a sentence of life imprisonment or a term of 99 years for an offense under Section 20.04, 22.021, or 29.03, murders another;

(7) the person murders more than one person:

(A) during the same criminal transaction; or

(B) during different criminal transactions but the murders are committed pursuant to the same scheme or course of conduct;

(8) the person murders an individual under six years of age; or

(9) the person murders another person in retaliation for or on account of the service or status of the other person as a judge or justice of the supreme court, the court of criminal appeals, a court of appeals, a district court, a criminal district court, a constitutional county court, a statutory county court, a justice court, or a municipal court.

(b) An offense under this section is a capital felony.

(c) If the jury or, when authorized by law, the judge does not find beyond a reasonable doubt

that the defendant is guilty of an offense under this section, he may be convicted of murder or of any other lesser included offense.

Section 20.03. Kidnapping

(a) A person commits an offense if he intentionally or knowingly abducts another person.

(b) It is an affirmative defense to prosecution under this section that:

(1) the abduction was not coupled with intent to use or to threaten to use deadly force;

(2) the actor was a relative of the person abducted; and

(3) the actor's sole intent was to assume lawful control of the victim.

(c) An offense under this section is a felony of the third degree.

(2)

FILED
JAN 23 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-828

IN THE SUPREME COURT OF THE UNITED STATES

CATHY LYNN HENDERSON,
Petitioner,

v.

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent.

On Petition for Writ of Certiorari
to the Fifth Circuit Court of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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ATTORNEYS FOR RESPONDENT

QUESTIONS PRESENTED

1. Whether a Petitioner raising Sixth Amendment claims:

   A. regarding state law enforcement conduct can expressly waive review of the lower court's primary holding that the issue is unexhausted and procedurally defaulted, yet then seek a merits review of the same facts by transforming them into new, and defaulted, Fifth Amendment allegations instead?

   B. regarding pre-trial counsel's allegedly ineffective assistance is entitled to an exception to the offense-specific rule clarified in *Texas v. Cobb*, 532 U.S. 162 (2001)?

2. Whether a Petitioner seeking certiorari review of the Fifth Circuit's affirmance of the district court's denial of habeas relief is ever entitled to review of claims never raised in federal habeas, and only impliedly raised in state court?

3. Whether a Petitioner whose Sixth Amendment ineffective assistance of appellate counsel claim was denied for lack of prejudice is entitled to certiorari review?

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner Cathy Lynn Henderson[1] is scheduled to be executed in the State of Texas **after 6:00 p.m. C.S.T. on Wednesday, April 18, 2007**, for the capital crime of murdering Brandon Baugh, a three-and-a-half-month-old infant left in her care. Henderson has unsuccessfully contested her presumptively valid conviction and sentence in the state and federal courts, arguing inter alia that she was denied her Sixth Amendment rights because law enforcement officials engaged in conduct that compromised the confidentiality of her communications with her lawyers; because the attorneys who represented her on kidnapping charges rendered ineffective assistance for failing to protect the confidentiality of a map she drew to Brandon's body; and because appellate counsel failed to ensure that a transcript of an *in camera* colloquy was included in the record on appeal. She now petitions this Court for a writ of certiorari, complaining that the Fifth Circuit erred when it upheld the district court's denial of habeas relief.

In the lower courts, Henderson raised unexhausted claims on which relief was procedurally barred, and raised exhausted claims on which she failed to meet 28 U.S.C. § 2254(d)(1)'s requirement that the state court's adjudication be contrary to, or unreasonably apply, this Court's precedent. As a result, the district court correctly denied relief and the Fifth Circuit correctly affirmed on appeal. Here, Henderson fails to show differently and, therefore, the Court should deny certiorari review.

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[1] Respondent Nathaniel Quarterman is referred to herein as "the Director."

STATEMENT OF THE CASE

I. Facts of the Crime, Events Surrounding Henderson's Arrest, and the Recovery of Baby Brandon's Body

The Texas Court of Criminal Appeals set forth the following account of the facts:

> On the morning of January 21, 1994, Eryn and Melissa Baugh left their infant son, Brandon, with their babysitter, [Henderson]. That day, both [Henderson] and Brandon disappeared. [Henderson] was profiled on the television show "America's Most Wanted," and Texas law enforcement authorities and the FBI received tips indicating that [Henderson] had been seen with the baby in Missouri and Idaho. In addition, law enforcement obtained information from [Henderson's] daughter that the trunk of [Henderson's] car had been slightly ajar during a trip on the 21st to Holland, Texas and that [Henderson] had carried a diaper bag in her car.
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> On February 1, [Henderson] was arrested by the FBI in Kansas City, Missouri. FBI agent Michael Napier interrogated [Henderson], while FBI agent Timothy Hepperman observed from behind a one-way mirror. [Henderson] first denied any knowledge of Brandon's location or well-being. Later, she stated that the baby's grandmother, driving a car with Oklahoma license plates, picked up Brandon during the afternoon of January 21. [Henderson] later admitted to killing Brandon but claimed that his death was an accident. She told

Agent Napier that she had buried the baby in a wooded area near Waco, that she had used a spade to dig the grave and had left the spade lying nearby, and that she could take an officer to the scene. Napier memorialized [Henderson's] final story in writing, but she refused to sign the written statement. Agent Napier then turned to the subject of drawing a map, and asked [Henderson] a number of times if she would draw a map of the baby's location. She repeatedly declined to do so and subsequently requested an attorney. The interrogation was then terminated. At the conclusion of the interview, Agents Napier and Hepperman both formed the subjective belief that the baby was dead. On February 2, 1994, Agent Hepperman communicated to Travis County deputies Stan Hibbs and Rick Wines that he believed the baby was dead and also that [Henderson] had declined requests to draw a map.

That same day, Ronald Hall, assistant federal public defender in Kansas City, and Ronald Ninemire, chief investigator for the public defender's office, met with [Henderson]. During the course of conversations with [Henderson], Hall determined that he needed a map. He contacted Agent Hepperman and inquired about obtaining a Texas map. Not knowing who Hall was, Hepperman was uncooperative. In response, Hall told Hepperman that he was trying to locate the baby. Frustrated in his attempts to obtain a map in the federal courthouse, Hall walked across the street to his office and obtained a map from Ninemire's desk. Later, Hepperman arranged delivery of a

Texas map to Hall and apologized for the earlier encounter.

After interviewing [Henderson], Hall talked to a group of law enforcement agents, including Carla Oppenheimer (the assistant U.S. Attorney handling the case), Agent Hepperman, and Deputies Hibbs and Wines. Hall told this group that he believed the baby was dead and buried in a wooded area outside Waco. Several of the law enforcement agents testified that Hall also stated that [Henderson] had drawn a detailed map of the location of the baby and that he (Hall) had never been to Texas but could find the baby with the map. Hall denied making these statements regarding the map and denied that he ever volunteered that [Henderson] had made a map. Instead, Hall testified that he was asked about a map and that he simply stated that all materials were being forwarded to [Henderson's] attorneys in Texas. The testimony is uncontroverted, however, that Hibbs asked both Hall and Ninemire for copies of the map, and both declined such requests.[2] Hepperman and Oppenheimer nevertheless formed subjective beliefs that the map was made with an intent to be turned over to law enforcement. Hepperman based his belief on statements made by Hall to him in attempting to obtain a Texas map while Oppenheimer based her belief on statements made by [Henderson] during the FBI interrogation.

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[2] Hibbs admitted that he asked Hall if he could accidentally leave a copy of the map on the fax machine.

That day, law enforcement authorities asked Nona Byington, [Henderson's] Texas lawyer, for the map, and she attempted to negotiate a plea bargain in which she would exchange the maps in her possession for an agreed sentence. On February 3, a Travis County grand jury issued a subpoena duces tecum for Byington to appear and produce any maps in her possession that were created by [Henderson]. Byington did not appear before the grand jury. Travis County Sheriff Terry Keel subsequently obtained an arrest warrant for Byington and a search warrant for her car and office. On February 4, the arrest warrant was withdrawn but the search warrant for Byington's office and car was executed. No maps were found in the search. During this period of time, Byington was herself represented by attorneys who claimed that the maps were covered by the attorney client privilege. In addition, [Henderson] herself signed an affidavit [on February 7] stating that all communications or materials conveyed by her to her attorneys during the course of representation were privileged and not to be disclosed.

Meanwhile, on February 2, [Henderson] had been transferred from Missouri to Texas custody. While confined in Texas, [Henderson] made various statements concerning Brandon's whereabouts. At one point, she denied any knowledge of the child's location and stated that he had gone with his grandmother. At another point, [Henderson] stated that she could draw a map to a drop-off point in Missouri where the baby had been taken to Oklahoma.

> On February 7, the grand jury issued another subpoena and the State filed a motion to compel production, in compliance with that subpoena, of any maps drawn by [Henderson] in Byington's possession. A hearing was held before Judge Jon Wisser [on February 7] in which the State contended that (1) the maps were not confidential communications covered by the attorney-client privilege, and (2) the maps fell within the crime-fraud exception to the privilege. [On February 8,] Judge Wisser granted the motion to compel. He found that, although an attorney-client relationship between Byington a nd [Henderson] existed, the maps were not privileged because they were made with the intent to be turned over to law enforcement authorities. Judge Wisser explained that, in arriving at his conclusion, he consulted "one of my much more learned brethren of the law school," whom the parties later learned was Professor Guy Wellborn, an expert on the rules of evidence.
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> As a result of Judge Wisser's ruling, copies of the two maps were turned over pursuant to the grand jury subpoena. According to Hibbs, the maps in fact indicated a grave site. Using the maps, law enforcement authorities found the baby's grave site and recovered his body.

Henderson v. State, 962 S.W.2d 544, 548-550 (Tex. Crim. App. 1997).

II. Procedural History and Facts Relevant to Henderson's First Two Claims for Review

On January 23, 1994, the State of Texas issued a criminal complaint, probable cause affidavit, and warrant for Henderson's arrest for kidnapping. 14 SR at State's Pre-Trial Ex. 14.[3] Two days later, the federal district court in Austin issued a criminal complaint against Henderson for kidnapping. *Id.* at State's Pre-Trial Ex. 1. Following her arrest in Missouri, Henderson was returned to Texas on February 2, 1994. Tr 770 (Finding of Fact ["FF"] 9).[4] On February 3rd, Nona Byington was served with a subpoena duces tecum by a Travis County grand jury to appear and produce any maps in her possession that Henderson had created. *Id.* (FF 12). When Byington failed to appe ar, the State moved to compel production of the maps, and a hearing was held on the motion on February 7th. 14 SR at State's Pre-Trial Ex. 11. On February 8th, the trial court ordered production of the maps. Tr 772-773 (Conclusion of Law ["CL'"] 3); 14 SR at State's Pre-Trial Ex. 12. On February 8th, authorities located a grave site containing Brandon's dead body. 13 SR 1182-1184.

On February 9, 1994, the State of Texas initiated formal adversarial proceedings against Henderson for capital murder by issuing an affidavit for warrant of arrest and detention, and by filing a formal criminal complaint. Tr 6-12. Henderson was indicted on April 22, 1994, and charged with murdering an individual under six years of age -- a capital offense in Texas. *Id.* at 4; TEX. PENAL

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[3] "SR" refers to the transcription of the state court capital murder trial and punishment proceedings, preceded by volume number and followed by page reference.

[4] "Tr" refers to the transcript of pleadings and documents filed with the clerk during the state court trial, followed by page number.

CODE ANN. § 19.03(a)(8) (Vernon's 1994); *App.* 129a-130a.[5] The indictment alleged Henderson killed Brandon Baugh "by striking his head against a blunt object unknown to the Grand Jury and by a manner and means unknown to the Grand Jury." Tr 4.

Henderson pleaded not guilty, and the case proceeded to trial in April 1995. Tr 749. A jury found Henderson guilty of capital murder[6] and, at the close of punishment evidence, found that Henderson presented a future threat to society and that insufficient mitigating evidence existed to warrant a sentence of less than death. *Id.* at 722, 738.[7] In accordance with Texas law, on May 30, 1995,

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[5] "*App.*" refers to Henderson's Appendix, followed by page reference.

[6] During guilt/innocence, three forensic pathologists (two for the State and one for the defense) unanimously concluded that the injuries to Brandon's head could not have resulted from an accidental fall, 33 SR 896; 34 SR 987, but could only have resulted from the infant being slammed with extreme force against a blunt surface such as a countertop or floor. 33 SR 867, 891. The injuries were comparable to those that might result from a fall of greater than two stories. *Id.* at 867. Defense expert Dr. Kris Sperry, however, opined that Brandon's injuries were consistent with a single, impulsive (and, therefore, possibly unintentional) act. 34 SR 987, 993-94.

[7] During punishment, the State established that Henderson assaulted her daughter Melissa verbally and physically, neglected her, and left her for days or weeks at a time at a day care center. Henderson's parental rights were terminated, and Melissa was adopted by her daycare provider. 36 SR 49-57, 60, 80-81, 89, 115-117; 37 SR 373; 38 SR 510, 514, 519-23. The State's evidence also described how Henderson assaulted her five-year-old niece and a coworker, regularly engaged in illegal drug use and occasionally in drug trafficking, and had a criminal history of public intoxication, giving false information to a peace officer, possession of a controlled substance, shoplifting (which occurred in the presence of her daughter), assaulting her husband (after which he applied for a protective order to protect their daughter, Jennifer), and driving while intoxicated. *E.g.*, 36 SR 19-23, 90, 103-05, 174-178, 185-89; 37 SR 328, 340, 362-63, 370.

trial judge Jon Wisser sentenced Henderson to death.

On direct appeal, the Texas Court of Criminal Appeals denied relief on seventeen grounds, affirmed Henderson's conviction and sentence, and later denied rehearing. *Henderson v. State*, 962 S.W.2d 544 (Tex. Crim. App. 1997). Henderson moved for leave to withdraw the mandate, asking the Texas court to consider the transcript of an *in camera* colloquy that had not been included in the appellate record, but her request was denied. *Id.*, 977 S.W.2d 605 (1998). This Court denied certiorari review. *Henderson v. Texas*, 525 U.S. 978 (1998).

Henderson sought state habeas corpus relief on eighteen claims. Judge Wisser entered findings of fact and conclusions of law recommending that relief be denied. *Ex parte Henderson*, No. 49,984-01 (Tex. Crim. App.) at Supp. Trans. of Aug. 2001 at 1-12. The Court of Criminal Appeals adopted the same and denied relief. *Id.* at unpublished order of March 6, 2002.

Henderson filed a preliminary, or skeletal, federal habeas petition in February 2003, and then amended her petition the following month raising a total of thirteen claims, and providing two volumes of exhibits. 1 ROA 21-45, 47-76.[8] Aside from supplementing her amended writ to include a signed affirmation page from her attorney, *id.* at 78, Henderson never supplemented or amended her writ again. In March 2004, the federal district court below granted summary judgment and denied each claim. *App.* 1a-24a. Henderson moved to alter or amend the judgment, which was denied. 2 ROA 359-365; *App.* 109a-116a. However, the court granted a certificate of appealability ("COA") on seven issues, all of which were based solely on the Sixth Amendment. *App.* 118a-

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[8] "ROA" stands for the federal habeas record on appeal in the Fifth Circuit, preceded by volume and followed by page reference.

120a, 124a. In granting a COA, the district court found jurists might disagree with the court's resolution "of her Sixth Amendment claims under the rule announced in *Texas v. Cobb* [, 532 U.S. 162 (2001)], and that reasonable jurists might resolve her ineffective assistance of appellate counsel claim differently." *App.* 124a.

Henderson applied for a COA from the Fifth Circuit on four additional claims,[9] but the court denied her request. *App.* 25a-55a.[10] Following briefing and oral argument on the seven issues certified by the district court, the Fifth Circuit affirmed the denial of habeas relief. *Henderson v. Quarterman*, 460 F.3d 654 (5th Cir. 11 Aug. 2006); *App.* 1a-24a. The court also denied rehearing. *App.* 125a-126a. Henderson petitioned for certiorari review of the Fifth Circuit's latter decision, and this opposition followed.

III. Facts Relevant To Henderson's Third Claim

During the February 7, 1994 grand jury subpoena hearing on the State's motion to compel disclosure of the maps, an *in camera* colloquy occurred between Judge Wisser and Henderson's attorney Nona Byington, wherein Judge Wisser expressed his belief that the child was dead. Henderson's Fed. Writ Ex. PP at 76.[11] The

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[9] One COA claim asserted that the Fifth and Fourteenth Amendments were violated because her statement to the FBI was involuntary and coerced. Application for [COA] at 31-34. This was the only Fifth Amendment claim raised in Henderson's amended writ. *Compare id. with* 1 ROA 55-72.

[10] Henderson states that she "does not seek review of the court of appeals' denial of a [COA]." Petition at 1 n.1.

[11] Henderson characterizes this as a "lower court finding." Petition at 3. Judge Wisser never issued any finding regarding his personal belief. 3 Tr 768-773 ("Findings of Fact and Conclusions of Law on Defendant's Motion(s) to Suppress Due to Violation of Attorney-Client Privilege").

following day, Judge Wisser granted the State's motion and ordered disclosure of the maps. 14 SR at State's Pre-Trial Ex. 12. The record provided to the Court of Criminal Appeals did not include a transcript of the *in camera* colloquy. During state habeas corpus proceedings, Henderson's appellate attorney Keith Hampton stated in aa affidavit that he did not know about the *in camera* proceeding and, thus, did not raise it on direct appeal. *Ex parte Henderson*, No. 49,984-01 at Supp. Trans. of January 3, 2000 at 143.

SUMMARY OF ARGUMENT

On federal habeas review, Henderson alleged that she was denied her Sixth Amendment rights by the actions of state law enforcement and by the ineffective assistance of counsel prior to trial and on direct appeal. 1 ROA 47-76. But her claim regarding law enforcement is unexhausted and procedurally defaulted. Yet even if the allegations are considered, Henderson cannot establish a Sixth Amendment violation. Under *Texas v. Cobb*, *supra*, Henderson's Sixth Amendment right to counsel had attached on state and federal kidnapping charges by the time the trial court ordered production of the maps, but those same rights had not yet attached on the uncharged offense of capital child-murder. As a result, the Sixth Amendment was not violated by the acts of law enforcement or by the conduct of pre-trial attorneys Ron Hall, Nona Byington, Steve Brittain, and Linda Icenhauer-Ramirez -- each of whom played some role in protecting the confidentiality of the map.

Henderson further attempts to transform her existing Sixth Amendment claims into Fifth Amendment issues; however, new claims cannot be raised for the first time on appeal. And while Henderson seeks certiorari review of "important" constitutional issues "implicit" to the Texas court's direct appeal opinion, these issues were never raised on federal habeas.

Finally, while Henderson argues that she was denied constitutionally effective assistance on direct appeal because her attorney failed to ensure that a transcript of an *in camera* colloquy was included in the appellate record, habeas relief was correctly denied because, assuming *arguendo* counsel performed deficiently, Henderson failed to prove how the omission prejudiced her appeal.

ARGUMENT

Review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for "compelling reasons." SUP. CT. R. 10 (West 2004). Henderson advances no compelling reason in this case, and none exists. Indeed, the issues involve only the application of well-established habeas law and constitutional principles to the facts. Thus, the petition presents no important questions of law to justify the Court's exercise of its certiorari jurisdiction.

Additionally, because Henderson's § 2254 petition was filed after the effective date of the AEDPA, the petition is subject to a heightened standard of review. *Penry v. Johnson*, 532 U.S. 782, 792 (2001). Under the AEDPA, habeas relief is precluded for claims adjudicated on the merits in state court unless that adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or
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> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

28 U.S.C. § 2254(d).

I. The Courts Below Correctly Denied Relief on Henderson's Sixth Amendment Law Enforcement and Pre-trial Ineffective Assistance Claims.

As her first issue for granting review, Henderson argues that *Texas v. Cobb* does not support the decisions below and should not be extended to her case. Petition at 14-23. She insists the courts utilized *Cobb* to "fence-off merits review" of her "underlying constitutional claims that the State violated her right to remain silent and her right to counsel by forcing her attorney to betray her confidences, and that the assistance of her trial attorneys in attempting to do so was constitutionally ineffective." *Id.* at 14, 15. Yet Henderson never raised any such Fifth Amendment claim on federal habeas and cannot do so now on appeal. The Sixth Amendment claim she did raise concerning state law enforcement is unexhausted and defaulted, and she now expressly waives review of that procedural ruling. Most importantly, her waiver results in the Court no longer having any properly-raised claim before it which alleges improper state action. In any event, Henderson's Sixth Amendment law enforcement claim, as well as her pre-trial ineffective assistance claims regarding disclosure of the maps, are meritless based on this Court's precedent as clarified in *Cobb*.

A. Henderson's Fifth Amendment allegations are improperly before the Court.

Henderson argues the State employed tactics which made an end-run around the protections secured by *Miranda v. Arizona*, 384 U.S. 436 (1966), and which were more egregious than the conduct disapproved of in *Missouri v. Siebert*, 542 U.S. 600 (2004). Petition at 14. She insists the courts below avoided merits review by applying *Cobb* and then either ignoring, or mischaracterizing, her *Miranda* and Fifth Amendment claims. *E.g., id.* at 12 (issues "said to implicate *Texas v. Cobb*"), 14 ("fenced-off merits review"),

18-19 ("ignored" *Miranda* "altogether in the teeth of *Cobb's ratio decidendi*"), 20 ("portray[ed]" her right to counsel "as one arising *only* under the sixth amendment, and not equally under the fifth, per *Miranda*") (original emphasis).

The federal habeas record belies this claim. Henderson asserted only one Fifth Amendment claim in her amended writ petition -- that her statements to FBI Agent Napier were involuntary and coerced. *Compare* 1 ROA 72 *with id.* at 55-72; *see also App.* 65a-67a (list of all thirteen claims on which Henderson sought habeas relief); *App.* 118a-120a (list of all thirteen claims on which she sought COA). The district court never applied *Cobb* to the claim, nor should it have, since *Cobb* is a Sixth Amendment case. Henderson's Fifth Amendment claim was addressed, and denied, on the merits, *App.* 105a-108a, and, in turn, a COA was denied. *App.* 117a-124a; *App.* 35a-37a. If the district court "ignored" *Miranda* and the Fifth Amendment (aside from the claim regarding Napier), any omission occurred because Henderson never raised the allegations in her amended petition.[12]

Furthermore, in this Court, Henderson expressly waives review of her lone Fifth Amendment issue. Petition at 1 n. 1 (not seeking review of any claim on which a COA was denied); *id.* at 20 (stating that she seeks "no relief" based upon timing or content of *Miranda* admonition from Agent Napier, or based on what she

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[12] Henderson attempted to interject the Fifth Amendment into appellate proceedings by arguing that she "complained under the Sixth, Fifth, and Fourteenth Amendments about the actions of her attorneys. . . ." Appellant's Brief in *Henderson v. Quarterman*, No. 04-70032 at 19. Although she raised these allegations in her state writ and in her skeletal federal writ, she only raised a Sixth Amendment challenge in her amended federal petition. *Compare Ex parte Henderson*, No. 49,984-01 at State Writ at 70-114 & 1 ROA 27-32 *with* 1 ROA 55-59. She also asserted the Fifth Amendment as grounds for granting rehearing *en banc*, but rehearing was denied. *App.* 125a-126a.

admitted to Napier prior to invoking *Miranda* rights). And now, in stark contrast to her amended writ, Henderson wholeheartedly endorses that Napier thoroughly advised her of her *Miranda* rights and that she knew the consequences of making a statement. *E.g.*, *id.* at 20-21 ("correctly advised" of her rights, "[w]ords of broader dimension would be difficult to imagine," and she "therefore *knew* that if she answered any questions about the infant's death, she did so at her own peril.") (original emphasis).

Throughout her Petition, Henderson argues that the State violated her *Miranda*-protected rights in compelling disclosure of the maps; however, the Court should refuse her attempts to transform her existing Sixth Amendment claims into new, and heretofore defaulted, Fifth Amendment allegations. Indeed, this Court has long held that it will neither decide issues raised for the first time on petition for certiorari nor decide federal questions not raised and decided in the court below absent exceptional circumstances. *See, e.g., Adams v. Robertson*, 520 U.S. 83, 86 (1997) (*per curiam*) (citing *Heath v. Alabama*, 474 U.S. 82, 87 (1985), *Illinois v. Gates*, 462 U.S. 213, 218-222 (1983), and *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940)). Since Henderson's Fifth Amendment allegations are improperly before the Court, they should form no basis for certiorari review.

B. Henderson waives review of her unexhausted and procedurally defaulted Sixth Amendment law enforcement claim.

The only claim challenging law enforcement conduct which is arguably before the Court is Henderson's Sixth Amendment claim; however, she expressly waives review of this issue.

In her amended writ, Henderson argued that law enforcement officials engaged in conduct that compromised the confidentiality of her communications with her lawyers and violated the Sixth Amendment. 1 ROA 55-57. Specifically, she alleged that law enforcement unconstitutionally interfered with her Sixth Amendment right to effective assistance of counsel by repeatedly claiming that Brandon was alive despite information to the contrary, and that they did so in an effort to get around the attorney-client privilege that protected Henderson's maps from discovery. She also alleged that the trial judge's order to produce the maps violated the Sixth Amendment by "piercing the privilege. . . ." *Id.* at 57.

The federal habeas court found that Henderson never argued in state court that law enforcement conduct or Judge Wisser's ruling violated the Sixth Amendment[13] and, therefore, the claim was unexhausted. *App.* 71a-72a.(citing 28 U.S.C. § 2254(b); *Castille v. Peoples,* 489 U.S. 346, 349 (1989); *Picard v. Connor,* 404 U.S. 270, 275-276 (1971); *Rose v. Lundy,* 455 U.S. 509, 518 (1982); and *Baldwin v. Reese,* 541 U.S. 27, 33-34 (2004)). During oral argument at the Fifth Circuit, Henderson's appointed counsel conceded this very point. *App.* 11a.

Because Henderson failed to exhaust her state remedies and because the Texas courts would refuse to consider the merits in a successive habeas application, the district court found the Sixth Amendment law enforcement issue procedurally defaulted. *App.* 72a-73a (citing *Coleman v. Thompson,* 501 U.S. 722, 729 (1991)); *see* TEX. CODE CRIM. PROC. ANN. art. 11.071 § 5(a) (Vernon's

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[13] On direct appeal, Henderson challenged the trial court's order compelling production, but simply asserted that the ruling improperly infringed the attorney-client privilege. *See* Brief of Appellant in *Henderson v. State,* No. 72,157, at 58-85. She drew no necessary connection between a violation of the attorney-client privilege and the Sixth Amendment.

Supp. 1995) (barring successive state habeas applications absent a showing of cause or actual innocence). Henderson showed neither cause and prejudice, nor miscarriage of justice, as might serve to excuse her procedural default. *App.* 73a (citing *Bousley v. United States*, 523 U.S. 614, 623 (1998), and *Moore v. Roberts*, 83 F.3d 699, 701 (5th Cir. 1996)). On appeal, the Fifth Circuit affirmed the procedural ruling and refused to consider the claim. *App.* 11a.

Henderson dismisses this "exhaustion ruling" as "an alternative ground" for disposing of one of the claims "the district court thought implicated by *Cobb* . . . ." Petition at 3 n.3; *see id.* at 12-13. To the contrary -- the district court's procedural ruling was its *primary* basis for denying relief whereas the merits ruling was only offered alternatively. *App.* 71a-73a. The significance of this procedural bar cannot be understated where, as here, the Fifth Circuit flatly refused to consider the merits of Henderson's unexhausted and defaulted claim. *App.* 11a ("[T]his unexhausted claim cannot be considered."). Incredibly, Henderson states that she does not seek review of the procedural ruling because "if the decision below is reversed, there will be time enough for the district court to reconsider it." Petition at 3 n.3. Assuming *arguendo* this Court holds that *Cobb* does not apply, the lower courts would have no opportunity for "reconsideration" because, as a consequence of Henderson's waiver, her underlying claim would necessarily remain unexhausted and procedurally defaulted.

C. Procedural bar aside, Henderson's Sixth Amendment law enforcement claim, as well as her pre-trial ineffective assistance claims, are meritless based on *Cobb*.

Even if Henderson had not defaulted (and now waived) her law enforcement claim, Henderson had no Sixth Amendment right to counsel on the capital child-murder charge during the relevant

time period in question. And since the allegedly deficient performance of attorneys Ron Hall, Nona Byington, Steve Brittain, or Linda Icenhauer-Ramirez took place, if at all, prior to the attachment of that right, then no valid Sixth Amendment claim can be made. Thus, the district court held that Henderson had no grounds for raising any Sixth Amendment violation. *App.* 70a, 73a-79a (citing, *e.g.*, *Cobb*).[14] In accordance with *Cobb*, the Fifth Circuit affirmed that Henderson's pre-trial ineffective assistance claims were meritless. *App.* 11a, 12a-18a. Certiorari review is unwarranted here.

The Sixth Amendment right to counsel attaches at the initiation of "adversary judicial proceedings." *Michigan v. Jackson*, 475 U.S. 625, 629-30 (1986). The commencement of formal adversarial proceedings can include a formal charge, preliminary hearing, indictment, information, or arraignment. *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991); *United States v. Gouveia*, 467 U.S. 180, 188 (1984); *Kirby v. Illinois*, 406 U.S. 682, 689 (1972). Importantly, this Sixth Amendment right is offense specific. *McNeil*, 501 U.S. at 175. In *Texas v. Cobb*, this Court reaffirmed the rule, holding that even if the right to counsel has attached on one charged offense, it does not attach on uncharged offenses, even if those offenses are factually related or inextricably intertwined with the charged offense. *Cobb*, 532 U.S. at 167-68, 173-74. Rather, where the right has attached for one offense, it attaches only to other offenses not formally charged that "would be considered the same offense under the *Blockburger* test." *Id.* at 173. Under

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[14] The district court reasoned that Ron Hall's and Nona Byington's alleged disclosure that Henderson had drawn a map occurred, if at all, sometime between Henderson's arrest and the February 7, 1994 motion to compel hearing whereas the allegedly ineffective assistance of attorneys Steve Brittain and Linda Icenhauer-Ramirez occurred, if at all, during the same February 7th hearing. *App.* 79a.

Blockburger, two offenses are not the "same offense" if one "requires proof of a fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304 (1932).[15]

Henderson was formally charged with kidnapping in late January 1994. 14 SR at State's Pre-Trial Ex. 1 & 14. Therefore, at the time of Judge Wisser's February 8, 1994 ruling compelling production of the maps, Henderson had a Sixth Amendment right to counsel on state and federal charges of kidnapping, which Texas law defined as "intentionally or knowingly abduct[ing] another person." TEX. PENAL CODE ANN. § 20.03(a) (Vernon's 1994); *App.* 131a. However, the State did not initiate formal adversarial proceedings against her for capital child-murder until February 9, 1994. Then, the State issued an arrest warrant and filed a formal criminal complaint against Henderson for capital child-murder for her intentionally or knowingly causing the death of Brandon Baugh, an individual "under six years of age." Tr 6-12; TEX. PENAL CODE ANN. § 19.03(a)(8); *App.* 129a-130. [16]

Under the *Blockburger* test, each offense for which Henderson was charged (kidnapping versus capital child-murder) requires proof of different facts. As the Fifth Circuit explained, the kidnapping charge requires that the child have been taken from his guardian, while the capital child-murder charge requires that the child have been killed. *App.* 16a. As such, Henderson's Sixth

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[15] Federal and state offenses -- even if the elements are identical -- are not the "same offense" for Fifth or Sixth Amendment purposes because the federal and state governments are separate sovereigns. *See Heath v. Alabama*, 474 U.S. at 88-93; *United States v. Avants*, 278 F.3d 510, 517 (5th Cir 2002).

[16] Importantly, Henderson was not tried for kidnapping, nor did the State charge her with capital murder based on murder in the course of a kidnapping under TEX. PENAL CODE ANN. § 19.03(a)(2) (Vernon's 1994). Thus, the kidnapping charges form no basis for her conviction and current incarceration.

Amendment right to counsel did not attach on the capital murder charge until she was formally charged on February 9, 1994. *See Cobb*, 532 U.S. at 173. Most importantly, since the complained-of conduct by law enforcement, by Henderson's attorneys, or even by Judge Wisser's ruling occurred prior to February 9th, Henderson's Sixth Amendment rights were not violated. Indeed, where there is no right to counsel, there can be no right to the effective assistance thereof. *See Wainwright v. Torna*, 455 U.S. 586, 587-88 (1982).

To merit federal habeas relief, Henderson need establish that the state court's adjudication was contrary to, or unreasonably applied, this Court's clearly established precedent. 28 U.S.C. § 2254(d)(1). When faced with her Sixth Amendment claims on state habeas, the convicting court issued findings and conclusions that Henderson's attorneys were not constitutionally ineffective, and the Court of Criminal Appeals adopted the same in denying relief.[17] As *Cobb* makes clear, because Henderson had no Sixth Amendment right to counsel for the capital child-murder charge during the time these four attorneys acted on her behalf on the kidnapping charge, she had no legal grounds for a Sixth Amendment claim. Therefore, the state court's denial of relief was not unreasonable under the AEDPA. Henderson fails to show differently where, as here, she does not even mention the burden imposed upon her by the AEDPA. *See* Petition at 14-23.

D. The Court should reject Henderson's attempts to discount or distinguish *Cobb*.

Initially, Henderson challenges *Cobb* by suggesting that the lower courts used it to avoid a merits review of her constitutional claims. Petition at 12 (court "did not reach merits of petitioner's

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[17] *Ex parte Henderson*, No. 49,984-01 at Supp. Trans. of Aug. 2001 at 1-4; *Id.* at unpublished order of March 6, 2002.

claims"), 14 (courts "used *Cobb* to fence-off merits review"). To the contrary, before reaching the issue of whether Henderson's counsel was ineffective under the Sixth Amendment, the court first had to address whether Henderson even had a Sixth Amendment right to counsel to begin with. The court's holding that she had no such right on capital child-murder charges was, in fact, a merits determination, as opposed to a purely procedural ruling.

Henderson attempts to distinguish *Cobb* are unavailing. First, she argues that her case "does not implicate *Cobb's* concerns about the differences in the waiver standards of *Miranda* and *Jackson*." Petition at 15-20 (citing *Michigan v. Jackson*, *supra*). By Henderson's account, *Cobb* "at bottom" resolved a conflict "between *Miranda's* standard of waiver of the right to counsel during the interrogation of uncharged crimes, and the greater hurdle imposed by *Jackson*, when and if police wish to interrogate a defendant about a crime on which he has already been charged." *Id.* at 15-16. According to Henderson, since no waiver-standard conflict existed in her case, *Cobb* is inapplicable. *Id.* at 18. However, *Cobb* is not a waiver case. Instead, *Cobb* is solely concerned with when the Sixth Amendment right to counsel attaches, and its purpose could not be clearer -- to reaffirm that *McNeil* "meant what it said, and that the Sixth Amendment right is offense specific." *Cobb*, 532 U.S. at 164 (citing *McNeil v. Wisconsin*). *Cobb* also abrogated those state court and federal courts of appeals cases which had read into *McNeil* an exception for crimes that are "factually related" to the charged offense. *Id.* at 168. Although Henderson argues *Cobb* is inapplicable because she had no conflict in waiver standards, *Cobb* offered no such exception to the offense-specific rule originally announced in *McNeil*.

Further, Henderson argues that there is no meaningful distinction between the right to counsel under *Miranda* and the right to counsel under the Sixth Amendment because counsel's office is

at all times to maintain the suspect's right not to incriminate herself. Petition at 19-20 (citing *Patterson v. Illinois*, 487 U.S. 285, 294, n.6 (1988)).[18] Certainly most defendants would want to maintain a confidential relationship with cour el. However, if this was reason enough to allow the Sixth Amendment right to counsel to attach to all uncharged offenses, then the *Cobb* rule would be rendered meaningless for all accused individuals who might potentially face additional yet-to-be-filed charges.

Next, Henderson contends *Cobb* is inapplicable because its Sixth-Amendment-offense-specific rule arose out of concern that "time-shifting the *Jackson* standard" may lead police to refrain from questioning certain defendants altogether. Petition at 20 (citing *Cobb*, 532 U.S. at 173-174). In Henderson's view, her case did not have any "police confusion"about invoking her Fifth Amendment rights -- she was thoroughly advised of her *Miranda* rights, she understood those rights, she voluntarily spoke to Agent Napier, and she then later invoked her *Miranda* rights. *Id.* at 20-21. Yet *Cobb* offered no exception to its offense-specific rule based on an absence of "police confusion," and such an exception would likewise render *Cobb* meaningless.

As her last attempt to justify that *Cobb* should not apply, Henderson argues "*Cobb* does not sanction State invasion of [her] right to counsel simply because the ultimate fruit differed from that asserted to justify the invasion." Petition at 21. Presumably, acts of law enforcement are not justified by the fact that officers hoped to

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[18] She also asserts that *Patterson* "scotches the court of appeals' efforts to portray petitioner's right to counsel as one arising only under the sixth amendment, and not equally under the fifth, per *Miranda*." Petition at 20, 22. Yet as previously explained, the lower courts addressed Henderson's "right to counsel" claims on Sixth Amendment grounds because that was the only legal basis raised on federal habeas. *E.g.*, *App.* 65a-66a, 118a-119a.

find Brandon alive and the victim of kidnapping, but instead found his dead body (the ultimate fruit) and charged Henderson with capital child-murder. *See id.* at 21-23. However, there is no properly raised claim of improper state action currently before this Court. As explained in Part I. A. & B., *supra*, Henderson raised no Fifth Amendment claim on federal habeas (aside from the voluntariness of her statement to Agent Napier), and her Sixth Amendment claim challenging law enforcement conduct and Judge Wisser's ruling to produce the maps is unexhausted and defaulted. Since Henderson expressly waives review of the "exhaustion ruling," Petition at 3 n.3, the Court should not consider the alleged merits of any improper state conduct claim.

Henderson further argues that *Cobb's* offense-specific rule is "harsh" and should not apply because, at the time of the allegedly problematic conduct, she was charged with kidnapping the same child she was eventually charged with murdering and, thus, "there seems significant danger of gamesmanship by authorities." Petition at 21 (citing *App.* 122a). Although the respondent in *Cobb* predicted that an offense-specific rule would prove disastrous because it would "permit law enforcement officers almost complete and total license to conduct unwanted and uncounseled interrogations," this Court rejected the argument because he offered no proof such a "parade of horribles" had occurred in those jurisdictions which followed an offense-specific rule. *Cobb*, 532 U.S. at 171. Henderson does not specifically argue that her case actually presents that "parade of horribles." *See* Petition at 21-23.

Nor could she. As the Fifth Circuit explained, Henderson's factual situation "would *not* fit in such a parade." *App.* 17a (original emphasis). For example, there is no claim that Henderson did not receive her *Miranda* warnings. Indeed, in this Court, she applauds the thoroughness of FBI Agent Napier's warnings prior to taking her statement. *E.g.*, Petition at 20-21. The Fifth Circuit also

found compelling the fact that Henderson's pre-trial motion to suppress the evidence (maps) was heard extensively and denied on the merits.[19] *App.* 18a; *see, e.g.*, 9 SR 574-592, 642-652; 10 SR 777-827; 12 SR 1139-1154; 13 SR 1195-1204; 14 SR 1228-1129. Thus, even if Henderson's attorneys who represented her on kidnapping charges during the February 7th motion to compel hearing somehow failed to advance her interests, Henderson was afforded more than ample opportunity during pre-trial on the capital child-murder charge to represent those interests. And although Henderson asserts that her attorneys were compelled or pressured to surrender the maps, the record reflects that the maps were not actually produced until the trial court ordered production. Additionally, during pre-trial on the capital murder charge, Henderson's trial counsel withdrew the allegation that law enforcement authorities were attempting to violate the attorney-client privilege. *See* note 20, *supra.* Furthermore, because Henderson attempted to create a new-rule exception to *Cobb*, the lower courts reasoned she is arguably barred by *Teague v. Lane*, 489 U.S. 288, 310 (1989). *App.* 78a; *App.* 17a.

Finally, Henderson overlooks the very arguments advanced by this Court for why it was reaffirming the offense-specific rule in *Cobb*:

> First, there can be no doubt that a suspect must be apprised of his rights against compulsory self-

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[19] In August 1994, Henderson filed a "Motion to Suppress Due to Violation of Attorney-Client Privilege" which argued for suppression of "material revealed and recovered as a result of" the compelled release of the maps. 1 Tr 129-132. She also filed, yet later withdrew, an amended motion. 13 SR 1124. Henderson's trial counsel Linda Icenhauer-Ramirez explained that, because of the recent discovery of evidence not previously provided by the State, the defense would go back to its original motion. *Id.* She also informed the court: "Basically what we've deleted is the allegation that law enforcement authorities were attempting to violate the attorney/client privilege." *Id.* at 1126.

> incrimination and to consult with an attorney before authorities may conduct custodial interrogation. *See Miranda v. Arizona*, 384 U.S. at 479 . . .; *Dickerson v. United States*, 530 U.S. 428, 435 ... (2000) (quoting *Miranda*). In the present case, police scrupulously followed *Miranda's* dictates when questioning respondent. Second, it is critical to recognize that the Constitution does not negate society's interest in the ability of police to talk to witnesses and suspects, even those who have been charged with other offenses.

Cobb, 532 U.S. at 171-72 (footnote omitted). As the *Cobb* Court noted, "Even though the Sixth Amendment right to counsel has not attached to uncharged offenses, defendants retain the ability under *Miranda* to refuse any police questioning, and, indeed, charged defendants presumably have met with counsel and have had the opportunity to discuss whether it is advisable to invoke those Fifth Amendment rights." *Id.* at 171, n. 2. Although Henderson would like to portray herself as more or less adrift in the legal system with no one to assist her or protect her rights, she was not without such constitutional protections. The only reason her Fifth Amendment claims were not considered below is the direct consequence of Henderson's own failure to raise the same on federal habeas review.

II. Henderson's Attempt to Resurrect Issues Implicitly Raised on Direct Appeal in State Court but Not in the Federal Courts Below is Improper and Cannot Provide a Basis for Granting Certiorari Review.

In seeking a writ of certiorari, Henderson wants to empower the federal district court to review "constitutional questions" implicitly raised by the Texas Court of Criminal Appeals on direct appeal. Petition at 23-28. For example, she complains that the Texas court erred in denying her claim that her Fifth and Fourteenth

Amendment rights against self-incrimination were violated when attorney Ron Hall disclosed confidential information to authorities, claiming the decision incorrectly interpreted *Fisher v. United States*, 425 U.S. 391 (1976). Petition at 24-25 (citing *Henderson v. State*, 962 S.W.2d at 558-559). She also argues that attorney Nona Byington faced a conflict of interest under *Cuyler v. Sullivan*, 446 U.S. 335 (1980), when she was "put to the choice of going to jail or sacrificing her client's interests." Petition at 27. According to Henderson, this Court "should not preclude district court consideration of these important questions," least of all by "an unprincipled extension" of *Cobb*. *Id.* at 28.

As an initial matter, since Henderson seeks review of the Fifth Circuit's affirmance of the district court's denial of habeas relief, the underlying constitutional claims must necessarily have been raised on federal habeas. *See* 28 U.S.C. § 2254(d) (setting out standard for federal court's review of state court adjudication). Henderson simply ignores the AEDPA and instead, seeks certiorari review as "a gateway" to the district court's "full consideration" of the issues "in the first instance." Petition at 23-24. And in seeking review of "implicit" constitutional issues (as compared to explicitly raised issues), she ignores the AEDPA's requirements for exhaustion. Henderson cites no authority (and indeed there is none) which would ever allow this Court to grant review in such instance.

Henderson sought certiorari review of the Texas court's direct appeal decision and was denied review by this Court in 1998. *Henderson v. Texas*, 525 U.S. 978 (1998). If Henderson wanted to challenge the Texas court's consideration of *Fisher*, she could have done so eight years ago in her initial request for certiorari. Likewise, Henderson's claim al leging conflict of interest was raised, and rejected, on state habeas. *Ex parte Henderson*, No. 49,984-01 at State Writ at 79-80 (citing *Cuyler*). She failed to raise this claim in her amended federal petition, thereby defaulting it

from federal review. Henderson does not contend (nor could she) that the State somehow prevented her from seeking review of these claims in a proper manner. Instead, her request for review of this issue is nothing more than an improper attempt to obtain an entirely new federal habeas proceeding.

III. The Courts Below Correctly Denied Relief on Henderson's Appellate Counsel Ineffective Assistance Claim.

Henderson argues that appellate counsel was ineffective for failing to ensure the record contained a transcript of the *in camera* colloquy between Judge Wisser and attorney Nona Byington (Henderson's Fed Writ Ex. PP at 76). She asserts that she was prejudiced because the Texas court determined issues on appeal relating to her attorney-client privilege without the benefit of Judge Wisser's remark during that colloquy that he thought the baby was dead. 1 ROA 61-62.

A defendant is entitled to constitutionally effective assistance of counsel on appeal where the appeal is a matter of right under state law. *Evitts v. Lucy*, 469 U.S. 387, 395 (1985); *Douglas v. California*, 372 U.S. 353, 355 (1963). The performance of appellate counsel is assessed under *Strickland v. Washington*, 466 U.S. 668, 687 (1984), whereby Henderson must show professionally unreasonable performance that actually prejudiced her case. Even if counsel's representation was deficient, Henderson must affirmatively prove prejudice that is "so serious as to deprive [him] of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687; *see also Hill v. Lockhart*, 474 U.S. 52, 57 (1986) (defendant must affirmatively prove, not merely allege, prejudice). To this end, in state court, Henderson needed to show a reasonable probability that, but for counsel's deficiencies, the result of the proceeding would have been different; a "reasonable probability"

is one sufficient to undermine confidence in the outcome. *Strickland,* 466 U.S. at 694. The state habeas court rejected this claim, finding that Hampton did not render deficient or prejudicial performance.[20] The federal district court below denied relief because, assuming deficiency, Henderson could not show how the omission prejudiced her appeal. *App.* 90a-92a. The Fifth Circuit correctly affirmed. *App.* 19a-24a.

Although the *in camera* transcript shows that Judge Wisser had a personal belief that Brandon was dead, the primary basis for his ultimate ruling that Byington produce the maps was that the maps were not confidential communications made for the purpose of obtaining or facilitating professional legal services. 3 Tr 772. On appeal, the Texas court assumed, without deciding, that the maps were confidential and proceeded to determine that public policy interests in finding Brandon outweighed the privilege because *law enforcement authorities* had reason to believe that Brandon could still be alive:

> [T]he attorney-client privilege was legitimately required to yield to the strong public policy interest of protecting a child from death or serious bodily injury. At the time the trial court compelled production of the maps, *authorities* had reason to believe that the baby might still be alive. [Henderson] had initially given conflicting stories to the FBI, and at least one of those stories indicated that Brandon was still alive. While [Henderson] later claimed that the baby was dead, *law enforcement officials* were not bound to take her word for the matter. Further, she later told another

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[20] *Ex parte Henderson*, No. 49,984-01 at Supp. Trans. of Aug. 15, 2001 at 5; *Id.* at unpublished order of March 6, 2002 (adopting habeas court's findings and conclusions, and denying relief).

> inmate in Texas that the baby had been dropped off alive in Missouri to be taken to Oklahoma. Although the maps indicated a grave site and were consistent with [Henderson's] claim that the baby was dead and buried near Waco, *law enforcement officials* were entitled to believe that [Henderson] could be telling half-truths and that the maps might lead to a live baby. Even if *authorities* believed that the chance of the maps leading to a live baby was remote, they were entitled to pursue that remote possibility.[] If the child had been abandoned, or secreted with an accomplice of [Henderson's], his life or health might have been in jeopardy. Hence, *authorities* could obtain the maps in an attempt to terminate a kidnapping.[]

Henderson, 962 S.W.2d at 557 (emphasis added). The Texas court was clearly concerned with the beliefs of law enforcement officials in determining whether public policy interests in disclosure outweighed the privilege. *Id.* Under these circumstances, then, the rationale underlying its conclusion is not undermined merely by Judge Wisser's expression of his personal belief. Therefore, assuming counsel performed deficiently for failing to include the transcript, federal relief was denied because, given the Texas court's focus "on the mind-set of the authorities, as opposed to the belief of the judge," Henderson could not demonstrate how the omission prejudiced her on appeal. *App.* 92a. Furthermore, Henderson failed to meet the burden under the AEDPA of demonstrating in the courts below that the state court's denial of her claim was contrary to, or an unreasonable application of, *Strickland. App.* 20a (discussing limited role of appellate court in reviewing state court's decision under AEDPA).

To this Court, Henderson complains that the "sincerity of law enforcement" is an inappropriate basis for breaching attorney-client communications, and that Judge Wisser's belief that the baby was dead should have been controlling. Petition at 28-30. Yet even if the Texas court had reviewed the *in camera* colloquy, and even if it would have determined afterward that the public policy reasons justifying disclosure were not applicable, the court could simply have agreed with Judge Wisser's conclusion that the maps were not confidential communications made for the purpose of facilitating professional legal services. Consequently, Henderson does not demonstrate a reasonable *probability* that inclusion of the *in camera* proceedings would have changed the outcome on direct appeal, or that the result of the appeal was rendered unfair in the transcript's absence. Indeed, it is not enough that Henderson merely show that counsel's action had "some conceivable effect" on the outcome of the proceeding. *See Strickland,* 466 U.S. at 693.

CONCLUSION

The Court should deny certiorari review.

Dated: January 23, 2007

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In The
Supreme Court of the United States

CATHY LYNN HENDERSON,

Petitioner,

v.

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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The Brief in Opposition ("*Opp.*") is both predictable and unremarkable. Respondent offers little in defense of the Fifth Circuit's reliance upon *Texas v. Cobb*, 532 U.S. 162 (2001), and instead spares no effort in pummeling petitioner's appointed counsel for alleged procedural oversights that, in the context of this case, simply do not implicate *genuine* concerns about comity or finality.

1. *Texas v. Cobb* Should Not Be Extended To This Case

To recapitulate, the chief and compelling reasons why certiorari should be granted are (1) to sweep from the books the Fifth Circuit's unsupportable extension of *Cobb*, lest it infect both this case and post-*Cobb* jurisprudence generally (*Pet.*, at 14-23); so that (2) the district court may then consider whether the *ex post* "exception" to the attorney client privilege crafted in *Henderson v. State*, 962 S.W.2d 544, 557-59 (Tex. Ct. Crim. App. 1997) is contrary to or an unreasonable application of federal law (28 U.S.C. § 2254(d)(1)), as determined by this Court in *Fisher v. United States*, 425 U.S. 391(1976) and its progeny. *Pet.*, at 23-28.

This gateway office of the petition is important because the "exception" – especially if coupled with *Cobb* – is bound to curtail suspects from seeking the full measure of legal advice, and is bound to cause attorneys to hesitate or refuse to provide assistance if faced with even the possibility of being forced to testify against the client about any crime, charged or uncharged, the client may have disclosed. Nothing in *Cobb* remotely supports forcing attorneys to confront "the dilemma . . . of either advising the client without knowledge of *all* the relevant facts, or of

obtaining the necessary information from the client[] . . . at the risk of having to divulge it to an adverse party."[1]

Respondent's discussion of *Cobb* (*Opp.*, at 17-25) therefore is little more than a recycling of the reasoning of the courts below, devoid of any anchor in the concerns that informed this Court's decision. For example, the repeated point that "there can be no right of effective assistance of counsel" until and unless formal charges have been preferred (*e.g.*, *Opp.*, at 20) is belied by *Cobb's* square reliance upon *Miranda v. Arizona*, 384 U.S. 436 (1966) as the bulwark protection of the rights of uncharged suspects. *Cobb*, 532 U.S. at 171-72.

Respondent likewise fails to offer any principled justification for the patent inequity of extending *Cobb* to circumstances "where Henderson was at the time of the allegedly problematic conduct charged with kidnapping the same child she was eventually [i.e., the very next day] charged with murdering" (*Pet. App.* 122a). Petitioner was arrested on state and federal kidnapping charges (*Opp.*, at 7). An element each statute is an unlawful abduction, plus "interstate transportation" under the federal statute.[2] All else aside, her *Miranda*-appointed attorney *had* to arm himself with *all* the facts simply to deal with the statutory elements of the kidnapping charges themselves. When petitioner told him that the baby died in her Texas home, and disclosed the location of the Texas gravesite, counsel

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[1] Brief *Amici Curiae* on Behalf of the American College of Trial Lawyers, *et al.* in *Upjohn Corp. v. United States*, No. 79-886 (June 1980), at 17. All emphasis in materials quoted in this Reply Brief has been supplied.

[2] See TEX. PENAL CODE § 20.03(a) (*Pet. App.* 131a), and 18 U.S.C. § 1201.

knew that the kidnapping charges could not be proved. But he also knew that petitioner had information pertinent to the yet-uncharged crime of murder, and that his *Miranda* obligation extended to protecting her rights without regard to whether any particular crime had or had not been charged. Counsel therefore was on the horns of the very dilemma noted *ante*, p. 2.

It makes no sense to subvert *Miranda* by extending *Cobb* here, thereby conferring upon the State a license to compel petitioner's successor attorney to reveal confidences that led the State to charge petitioner with murder the very next day. This approach simply cannot be squared with the principle that attorney-client confidences rest upon "the need for the advocate and counselor to know *all* that relates to the client's reasons for seeking representation if the professional mission is to be carried out," *Trammel v. United States*, 445 U.S. 40, 51 (1980).

Respondent nevertheless argues that *Cobb* would be "meaningless" if not applied here (*Opp.*, at 22), but that is not accurate at all. In *Cobb*, the Court declined the State's invitation to overrule *Michigan v. Jackson*, 475 U.S. 625 (1986),[3] and simply held that *Jackson's* higher standard of "waiver" of the right to counsel is confined to post-indictment interrogation, and does not displace *Miranda* during pre-indictment interrogation. See *Pet.*, at 15-20. Neither that holding nor its jurisprudential underpinnings will be "meaningless" if the decision below is reversed, for petitioner's case has noting to do with *any* waiver of the

[3] See Pet. Br. in *Cobb*, 2000 U.S. S. Ct. Briefs LEXIS 431, at **18 ("*Jackson* is a dead letter and should be overruled.")

right to counsel during police interrogation on any crime, charged or uncharged.

2. Respondent's Waiver and Failure to Exhaust Arguments Are Not Well-Taken

Finding no refuge in *Cobb* itself, respondent asserts procedural defaults by petitioner's State-provided counsel ("waiver" and "failure to exhaust") as reasons for denying the writ. These arguments are not impressive because they do not even begin to implicate any genuine State interests in comity or finality.

It is well to remember that petitioner's arrest, trial, direct appeal, prior certiorari petition and the filing of her state habeas petition *all* took place before *Cobb* was decided, and thus came during an era in which the Texas courts (and the Fifth Circuit as well) saw no need to draw fine distinctions between the Fifth and Sixth Amendments as sources of the right to counsel. *Pet. App.* 14a. Moreover, the distinction drawn in *Cobb* goes only to the *Miranda* versus *Jackson* standards of waiver of the right to counsel during police interrogation, a distinction having no significance or application here at all.

Viewed in this light, respondent's argument that petitioner is out of court because her attorneys "waived" petitioner's Fifth Amendment rights (*Opp.*, at 13-15) has nothing to recommend it. Acknowledging as he must that petitioner had a right of counsel, under *Miranda*, even as to the uncharged crime of capital murder, and that "certainly, most defendants would want to maintain a confidential relationship" with their attorneys, respondent nevertheless faults petitioner solely because her appointed counsel should have included the words "Fifth Amendment"

in the federal habeas petition (*Opp.*, at 22). But this is not "waiver" in any sense of a deliberate choice of strategy, for at bottom, respondent is really saying no more than that counsel "erred" in failing to move for leave to amend the petition when the omission of reference to the fifth amendment was called to attention while the case was still before the district court.

Principles of liberality that inform motions to amend under F.R.CIV.P. 15(a) – "leave *shall* be freely given when justice so requires" – demonstrate that respondent cannot suffer any genuine prejudice if the Fifth Circuit's reliance upon *Cobb* is reversed, and the case then goes forward with due attention to Fifth and Sixth Amendment principles. This is particularly evident in light of *Patterson's* observation that, when the State attempts to wrest incriminating evidence from a suspect, charged or uncharged, the focus is upon the role of the lawyer's role in protecting her client, "rather than the particular constitutional guarantee that gives rise to the right of counsel." *Patterson v. Illinois*, 487 U.S. 285, 299 n. 6 (1988). *Pet.*, at 19-20. Respondent's "waiver" argument therefore stands on ceremony purely, and should not be credited by this Court.

Similar considerations also undermine respondent's argument that review should be denied because petitioner's appointed counsel failed to exhaust *one* of her claims in her state habeas petition. (*Opp.*, at 15-17). To begin with, each of petitioner's *Cobb*-implicated claims involving inadequate assistance of her counsel ("IAC") regarding seizure of the map *was* exhausted, and *will be* adjudicated if the decision below is reversed, for the Fifth Circuit rejected each of these *exhausted* claims solely on the basis of *Cobb*. *Pet. App.* 12a-18a. If the district court

thereby is permitted to adjudicate the merits of these *exhausted* IAC claims, respondent will at that point doubtless argue that counsel's errors were harmless in light of the "exception" crafted in *Henderson v. State, supra*. This will require the district court to consider the validity of the exception in light of the law clearly established by this Court in *Fisher v. United States, supra*, and the other authorities cited at pages 23-28 of the Petition. Therefore, even on the present record, exhaustion principles will not prevent the district court from adjudicating the issues that respondent would prefer to avoid.

In part because of the foregoing, and also for prudential reasons, the petition does not seek review by this Court – at this stage of the proceedings – of the alternate basis for the district court's holding that *one* of petitioner's *Cobb*-implicated claims had not been exhausted in her state habeas petition.[4] But if the case returns to the district court because *Cobb* is no bar, the district court's prior determination of non-exhaustion will then be – at most – no more than an interlocutory order of partial summary judgment, which has no preclusive effect and may be modified or withdrawn at any time prior to final judgment. 10B C. A. Wright, *et al.*, FEDERAL PRACTICE AND PROCEDURE § 2737, at 323 (West, 1998); Wm. Schwarzer, *et al.*, FEDERAL CIVIL PROCEDURE BEFORE TRIAL § 14:36, at 14-52 Rutter, 2006). That is precisely why we said that "if the decision below is reversed, there will be time enough

[4] See *Pet. App.* 72a, retroactively applying *Baldwin v. Reese*, 541 U.S. 27 (2004) to the state habeas petition's failure to challenge with precision "the trial judge's error in compelling [attorney] Byington to produce the map."

for the district court to reconsider" its prior ruling on exhaustion. *Pet.*, at 3, n. 3.

In this setting, the district court will be free to consider whether its prior ruling, based as it was only upon petitioner's state habeas petition, should be reexamined by focusing upon her direct appeal, which is an entirely adequate, alternate means of exhaustion under *Myers v. Collins*, 919 F.2d 1074, 1076 (5th Cir. 1990). Respondent admits that "on *direct appeal*, Henderson *challenged* the trial court's *order* compelling production," but he nevertheless argues that this challenge "simply asserted that the ruling improperly infringed upon the attorney-client privilege" devoid of constitutional significance. *Opp.*, at 16, n. 13. But under *Fisher* itself – the very case the CCA cited to support its "exception" to the attorney client privilege – the constitutional significance is altogether evident because the attorney is "*not bound to produce*" evidence "*that the client himself would be privileged from produc[ing] . . . as exempt from self-incrimination,*" *Fisher v. United States*, 425 U.S. at 404. No legitimate State interest will be invaded or frustrated if the district court examines the CCA's own misplaced reliance upon *Fisher*, and on the exhaustion question, chooses to "gracefully and good-naturedly surrender[] former views to a better considered position," *McGrath v. Kristensen*, 340 U.S. 162, 177-78 (1950) (Jackson, J., concurring).[5]

[5] The Fifth Circuit's reliance upon appointed counsel's concession during oral argument (*Pet. App.* 11a) is not pertinent to exhaustion via direct appeal because (1) the concession was confined to her counsel's own efforts on the state habeas petition, and (2) judicial admissions are in any event binding only as to matters of fact, not legal theories or conclusions. *See, e.g., New York State National Organization for Women v. Terry*, 159 F.3d 86, 97 n. 7 (2nd Cir. 1998); *McCaskill v. SCI*

(Continued on following page)

It also needs to be said that respondent's hectoring of appointed counsel is not appropriate, for any wounds the State might suffer if petitioner is permitted a decent chance to overcome her counsel's alleged errors would be wounds of self-infliction purely. It is a matter of judicial notice that there is great concern about the shortfall in the quality and resources of representation that states provide to capital defendants, and nowhere is this concern greater than that in Texas.[6] The provision of competent trial and appellate counsel is an obligation secured by *Gideon v. Wainwright*, 372 U.S. 335 (1963), and in Texas capital cases, this obligation extends to state and federal habeas as well.[7] Any claim that State-provided counsel committed material error is at once an admission that the State failed to provide the competent counsel that the law requires.

In response to the growing body of criticism that the State is not fulfilling these obligations, the Texas CCA has just adopted a new rule designed to improve the quality of appointed counsel.[8] That may bode well for the future, but

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Management Corp., 298 F.3d 677, 681-83 (7th Cir. 2002) (concurring opinion of Rovner, J., collecting the authorities).

[6] *See, e.g.*, C. Lindell, *Sloppy Lawyers Failing Clients on Death Row: For 11 Years, Top Texas Court Ignored Shoddy Work as 273 People were Executed*, THE AUSTIN STATESMAN-AMERICAN, October 29-30, 2006.

[7] *See* TEX. CODE CRIM. PROC. art. 11.071 § 2(a) (an applicant for habeas corpus relief in a capital case "shall be represented by competent counsel." Upon denial of the writ, appointed counsel "shall . . . move to be appointed as counsel in federal habeas review under 21 U.S.C. § 848(q)," (*id.*, § 2(e), for all of which the State shall reimburse the county in an amount that "may not exceed $25,000.00." *Id.*, § 2A(a)).

[8] *See* Amended Rules for the Appointment of Attorneys as Counsel under Article 11.071(d) Sec. 2(d), Texas Code of Criminal Procedure (CCA, December 11, 2006), available at http://www.cca.courts.state.tx.us/rules/rule4-appt-of-attys-final-121106rev.pdf (visited January 23, 2007).

petitioner is one of many still in the pipeline under the *ancien régime*, and these defendants have little choice but to look to the *pro bono* resources of the private bar as a means to help balance the scales. Cutting capital defendants just a modicum of slack – if it even be that – on the procedural defaults of prior counsel will improve the quality of justice at no expense to genuine State interests.

3. Reply on Question 3

Finally, on Question 3 of the petition (IAC on the direct appeal) we reply only that (1) respondent's characterization of the trial judge's remarks merely his "personal belief" – a term normally employed only when "belief" is based upon matters *dehors* the record – is unavailing, for the judge was stating his assessment of and conclusion from the evidence of record at the hearing; and (2) had the CCA been aware of this, it is reasonably probable that it would have given better and thoughtful consideration of both the grounds for its "exception" and its failure to give due attention to what *Fisher* squarely holds. For all the reasons discussed, and particularly in a capital case, "a probability sufficient to undermine confidence in the outcome" is present here. *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

CONCLUSION

The petition for a writ of certiorari should be granted

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Respectfully submitted,

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